(1) Supreme Court, U.S.

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No. ____

In the Supreme Court of the United States

JOSEPH GENTILE and LORRAINE GENTILE, husband and wife, et al.,

Petitioners,

v.

THE QUAKER OATS COMPANY, a New Jersey corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has the Ninth Circuit violated the Supreme Court holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) by requiring a Plaintiff in an ADEA case to prove more than a *prima facie* case and present evidence of pretext, while weighing the evidence to affirm summary judgment for the employer?

2. Does the U.S. Supreme Court requirement of "notice pleading" apply in the Ninth Circuit?

3. Should the United States Supreme Court resolve conflicting decisions in the Ninth Circuit concerning the law applicable to ADEA cases when such court refuses to do so?

THE PARTIES

Petitioners:

Joseph Gentile and Lorraine Gentile, husband and wife; Perry E. Coleman and Barbara Coleman, husband and wife; and Jerry Jeney and Peggy Jeney, husband and wife. Petitioners are individuals with no corporate affiliations.

Petitioners Joseph Gentile and Lorraine Gentile were plaintiffs in the U.S. District Court for the District Court of Arizona, Case No. CV 95-1516-PHX-RCB, and were appellants in the U.S. Court of Appeals for the Ninth Circuit, Case No. 99-15887. Petitioners Perry E. Coleman and Barbara Coleman were plaintiffs in the U.S. District Court for the District Court of Arizona, Case No. CV 96-0828-PHX-RCB, and were appellants in the U.S. Court of Appeals for the Ninth Circuit, Case No. 99-15885. Petitioners Jerry Jeney and Peggy Jeney were plaintiffs in the U.S. District Court for the District Court of Arizona, Case No. CV 96-0822-PHX-RCB, and were appellants in the U.S. Court of Appeals for the Ninth Circuit, Case No. 99-15886.

Respondent:

The Quaker Oats Company, a New Jersey corporation

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CITATION OF OPINIONS & ORDERS

Coleman v. Quaker Oats, 99-15885, Filed 11/20/00 (9th Cir. 2000); 232 F.3d 1271; 2000 U.S. App. Lexis 29580; 84 Fair Empl. Proc. Cas. (BNA) 602; 2000 Ca. Daily Op. Service 9270.

BASIS FOR JURISDICTION IN THIS COURT

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on the 20th day of November, 2000, and affirmed the district court's grant of Defendant's Motion for Summary Judgment. An Order denying Plaintiff's Motion for Rehearing *en banc* was entered on the 10th day of January, 2001. This Court has jurisdiction to review decisions of the Ninth Circuit Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS INVOLVED IN THE CASE

There are no constitutional provisions, treaties, ordinances or regulations involved in this Petition. There are, however, certain Federal Rules of Civil Procedure as follows:

Rule 3, F.R.C.P.:

"A civil action is commenced by filing a complaint with the court."

Rule 8, F.R.C.P.:

"(a) **Claims for Relief**. A pleading which sets forth a claim for relief, whether an original

claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. . . ."

Rule 15, F.R.C.P.:

"(a) **Amendments**. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

Rule 56, F.R.C.P.:

"**Summary Judgment**
(a) **For Claimant**. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse

party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party**. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon**. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . "

Also applicable is 29 U.S.C. §623:

"(a) **Employer Practices**
It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

***"

29 U.S.C. §631. **Age Limits**

"(a) **Individuals at least 40 years of age**

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age."

STATEMENT OF THE CASE

This action originally involved eight Plaintiffs, all former employees of Defendant Quaker Oats, with claims filed under the ADEA (29 U.S.C. §621) and with attendant common law contract and tort claims. The district court granted a defense motion to divide the Plaintiffs' cases into separate complaints, and the three cases which are the subject of this Petition are the ones that remained in Arizona.

The district court granted Defendant's Motion for Summary Judgment and denied Plaintiff's Motion for Summary Judgment, resulting in the appeals to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

The panel of the Ninth Circuit (by split decision) affirmed the ruling of the District Court granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion ("the Opinion"). The Opinion , was wholly inconsistent and in contradiction of existing law in the Ninth Circuit and contrary to established precedent from this Court.

A Petition for Rehearing En Banc was timely requested and the Ninth Circuit, in another split decision,

denied the same, which is one of the reasons for this Petition for Writ of Certiorari.

REASONS FOR GRANTING CERTIORARI

There presently is an urgent need for granting review of this Petition. An emergency exists in the Ninth Circuit. Simply stated, the Ninth Circuit has created a ridiculously chaotic situation in the law surrounding age discrimination cases.

The Opinion not only conflicts with decisions in other circuit appellate courts, it conflicts with opinions and decisions within the Ninth Circuit itself. Furthermore, certain judges within the Ninth Circuit, in order to achieve a desired result, are ignoring and disregarding existing case law from this court and other Ninth Circuit cases.

PART I - The Opinion Disregards Existing Law from this Court and the Ninth Circuit

After briefing and oral argument of this case, but before the Opinion was filed, this Court handed down *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Although the Ninth Circuit acknowledged the existence of *Reeves*, and indeed cited it in support of its Decision in *Chuang v. University of California Davis, Board of Trustees*, 225 F.3d 1115 (9th Cir. 2000), *Reeves* is neither acknowledged, referenced nor cited in the Opinion.

In its split decision in this case, the Ninth Circuit also failed to address, or even mention, the Ninth Circuit decision *Chuang, supra*. Eleven days after the Opinion was filed (December 1, 2000), the Ninth Circuit filed the unpublished opinion of *Gile v. Olsten Corporation*, 2000 U.S. App. Lexis

31191 (9th Cir. 2000), citing and relying upon *Chuang* to reverse summary judgment for an employer in similar ADEA case.

Reeves and *Chuang* require on summary judgment motions:

1. All reasonable inferences are drawn in favor of the non-moving party.

2. The court cannot make credibility determinations or weigh evidence.

Here, Petitioners were terminated in a reduction in force ("RIF")[1] based upon ratings from a new rating system never before used, were rated by people with no personal knowledge of Petitioners' skills during an average rating time of nine minutes per employee leading to a RIF where two-thirds of the people over 40 lost their jobs, while only one-third of those under 40 were terminated. Although the Ninth Circuit agreed that the EEOC determination of reasonable cause of age discrimination was admissible to prove discrimination and although the statistical evidence revealed the chance of no age discrimination was three out of 100 billion, the Ninth Circuit found there were no material questions of fact by disregarding it, i.e. weighing it.

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[1]Coleman was terminated several months later.

The Opinion violates *Reeves*[2] and *Chuang* because it "resolved material facts that were disputed and disregarded other important evidence". *Chuang*, *Id.* at 1124. Moreover, the Opinion violates *Reeves* as it requires the terminated employees' claim to be conclusive to avoid summary judgment for the employer.

PART II -- The Ninth Circuit Follows Neither the Law of This Court, Nor Its Own Prior Decisions Regarding the Spirit and Intent of the Federal Rules of Civil Procedure Pertaining to Pleading

In 1957, Justice Black, writing for this Court, clearly and succinctly explained the concept of notice pleading and its existence firmly embedded in the Federal Rules of Civil Procedure in *Connelly v. Gibson*, 355 U.S. 41 (1957).

Likewise, the Ninth Circuit in *Bautista v. L.A. County,* 216 F.3d 837 (9th Cir. 2000), reaffirmed the long-established fact that the Federal Rules of Civil Procedure envision notice pleading.

In *Katz v. Regents of the University of California*, 229 F.3d 831 (9th Cir. 2000), the Court of Appeals recognized the use of disparate impact as a viable basis for establishing a prima facie case submittable to a jury for age discrimination. The Ninth Circuit also held that disparate impact need not be used under our liberal pleading rules to establish and place the

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[2]At a minimum, the petition should be granted with a mandate that the Ninth Circuit reconsider the Opinion in view of *Reeves*. *See Motel 6 Operating L.P. v. Huttinger*, 530 U.S. 1241 (2000) granting writ of certiorari and remanding for consideration in view of *Reeves*.

other side on notice of Plaintiff's intent to assert it. See *EEOC v. Local 350,* 998 F.2d 641 (9th Cir. 1993); see also *Cotton v. City of Alameda*, 812 F.2d 1245 (9th Cir. 1987); *Palmer v. United States*, 794 F.2d 534 (9th Cir. 1986). Also note, *Bautista, supra.*

Ironically, while the majority was authoring a split decision in this case, another panel of judges on the Ninth Circuit was authoring *Gile, supra*, a much weaker case factually from the Plaintiffs' standpoint that reinforced the use of disparate impact as a basis to show discrimination in ADEA cases.

The Opinion (the majority) validated subjective criteria in a reduction in force where two-thirds of the older employees were terminated and only one-third of the younger employees were terminated. However, such a validation is absolutely contrary to the then-existing law of the Ninth Circuit. See *Warren v. City of Carlsbad,* 58 F.d 439, 443 (9th Cir. 1995); *Jauregui v. City of Glendale,* 852 F.2d 1128, 1135-36 (9th Cir. 1988).

PART III -- Intra-Circuit Conflict Within the Ninth Circuit and Public Policy Raise a Most Urgent Need for Granting this Petition

It is not news that the Ninth Circuit holds a view of the law distinct from other circuit courts of appeal. *E.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. ____ (2001) Intra-Circuit conflicts, however, make a mockery of the concept that we are a nation of laws. This Court, in *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950), granted certiorari to review the sufficiency of the grounds for a Court of Appeals Decision not to grant a petition to resolve intra-circuit conflicts through a rehearing *en banc.* See

Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S., 345 U.S. 247, 263, 97 L.Ed 986, 997 (1953).

Moreover, in *Daubert v. Merrill Dowell Pharmaceuticals, Inc.*, 509 U.S. 579, 1993, this Court granted certiorari for public policy reasons. As has been discussed previously and will be summarized in the conclusion, we submit there clearly is a strong public policy reason for granting certiorari in this case.

In this case, the Opinion conflicts with *Jauregui v. City of Glendale*, 852 F.2d 1128 (9th Cir. 1998) that confirmed inferences of discrimination arise from the use of subjective evaluations.

Furthermore, the Opinion elects to ignore the prior Ninth Circuit holding that the EEOC's determination of reasonable cause is admissible as probative evidence in discrimination cases (*Hegne v. Caruso*, 69 F.3d 1475, 1483 (9th Cir. 1995)) and the holding in *Gifford v. Atchison, Topeka and Santa Fe*, 685 F.2d 1149, 1156 (9th Cir. 1982) that an EEOC determination is sufficient at least to create an issue of fact precluding summary judgment.

CONCLUSION

This case is a tragic illustration of the chaos that can occur as a result of courts not following established law and precedent in handing down judicial rulings. Indeed, in this case, precedent, logic, and reason were abandoned in favor of ignoring or twisting precedent to achieve a desired result.

Certiorari is needed to restore a semblance of order and stability in ADEA suits in the Ninth Circuit. Without

intervention by this Court, the Opinion will go create a precedent that contradicts the law of this Court.

Justice and the rule of law should not depend upon the luck (or bad luck) of the draw in which members of the Court of Appeals are assigned to a particular panel.

In the area of ADEA cases, no legal practitioner can intelligently advise a client from either side (employee or employer) in view of the conflicting decisions. At the present time, because of a pervasiveness of the intra-circuit conflicts existing in the Ninth Circuit, it is virtually impossible to know what the law is in ADEA cases.

RESPECTFULLY SUBMITTED,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed November 20, 2000]

PERRY E. COLEMAN; BARBARA J. COLEMAN, husband and wife, *Plaintiffs - Appellants*,	) No. 99-15885)) D.C. No.) CV-96-0828-
v.	) PHX-RCB)
THE QUAKER OATS COMPANY, a New Jersey corporation, *Defendant - Appellee*.	)))))

JERRY JENEY; PEGGY JENEY, husband and wife, *Plaintiffs - Appellants*,	) No. 99-15886)) D.C. No.) CV-96-0822
v.	) PHX-RCB)
THE QUAKER OATS COMPANY, a New Jersey corporation, *Defendant - Appellee*.	)))))

PERRY E. COLEMAN; BARBARA J. COLEMAN; JOHN RUSSELL; JERRY JENEY; DENIS SCHWEITZER, a divorced man; JOHN TALLARITI; KENNETH NERO, GARY PEEPLES; J. THOMAS CHRISTENSON; SHARON RUSSELL; PEGGY JENEY; TERRINE TALLARITI; KATHLEEN FLAMM NERO; JAN MARIE IMMKER PEEPLES; KAYE CHRISTENSON; CAROL COLLINS, a single person, *Plaintiffs*,	) No. 99-15887)) D.C. No.) CV-95-1516-) PHX-RCB
and	
JOSEPH GENTILE; LORRAINE GENTILE, husband and wife, *Plaintiffs - Appellants*,	
v.	
THE QUAKER OATS COMPANY, a New Jersey corporation, *Defendant - Appellee*.	

Appeals from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
February 17, 2000--San Francisco, California

Court of Appeals Opinion - 11/20/00

Before: Betty B. Fletcher, William C. Canby, Jr., and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain.

Dissent by Judge B. Fletcher.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether former employees have raised a genuine issue of material fact as to whether they were illegally fired because of age.

I

A

Jerry Jeney ("Jeney"), Joseph Gentile ("Gentile") and Perry Coleman ("Coleman"), along with hundreds of other employees nationwide, were laid off by the Quaker Oats Company ("Quaker") in Arizona during a series of reductions-in-force ("RIFs") from 1994 to 1995.

1

Jeney, a 55-year-old white male,[1] began working for Quaker in 1987 after it had purchased the company at which

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[1]All ages are as of the year in which the employees were terminated.

Jeney was employed. At Quaker, Jeney worked for six years as a sales representative, a position equivalent to that which he had held at other companies since 1969. Jeney's responsibilities involved visiting supermarkets to rotate products, to arrange displays, to ensure adequate stocks, and to check if the supermarkets displayed all the company's products they were supposed to carry.

In 1993, a RIF threatened Jeney's job. Impressed with Jeney's skills, Ken Willis, a Quaker supervisor, created a new position for him - Area Retail Manager ("ARM"). Jeney was the only ARM in the Quaker organization nationwide and in this position assisted individuals with various accounts. Jeney's previous responsibilities as sales representative had been outsourced to independent food brokers. His new position required him to inspect and to grade the performance of the outside brokers and to prepare diagrams showing how to arrange products on the shelves. Jeney held this job until the 1994 RIF.

In 1994, Quaker implemented a nationwide business reorganization which eliminated almost all lower level sales positions. Quaker laid off 300 employees, including Jeney. The work of these employees was farmed out to outside brokers. This 50 percent reduction in workforce added high-paying jobs as it cut most low-ranking jobs. In order to select the employees who would remain, Quaker sent a human resources team to rate employees in several categories. Most of these categories emphasized skills developed through headquarters (management) work.

The ranking evaluated employees in six categories: strategic business planning, advanced fact-based selling,

category expertise, customer operations understanding, leadership ability, and communications skills. All employees were also evaluated on their learning agility and versatility. Jeney received poor scores in those categories representing headquarters skills with which Jeney had no experience: strategic business planning, advance fact-based selling, and category expertise. He received average scores in the remaining categories. Jeney also received an average score in "Learning agility," defined as one's ability to learn from past mistakes. In "Versatility," Jeney received a rating of well-placed, meaning that he was good at his current job, but not likely to advance. Overall he received a grade of "B." During this process, Quaker monitored the RIF to ensure that it did not have an adverse effect on race or gender diversity in the company. No action was ever taken because no such effect was identified.

Positions at Quaker are ranked by "hay points." A one-level promotion entails an increase of 100 hay points. Jeney's position as an ARM was 366 hay points. His previous position as a sales representative represented 301 hay points. Following the evaluation process, Quaker had to fill six positions in the Phoenix, Arizona area where Jeney worked. Ken Willis, the same employee who had created the ARM position specially for Jeney the previous year, did not select him to fill any of these job openings.

The first four job openings were for account executives, positions ranked at 636 or 732 hay points. The fifth position was a broker field manager at 732 hay points. The final opening was for a customer manager, a position with 438 hay points, much closer to Jeney's then current level of 366. All candidates selected for the account executive

positions had previously held comparable positions with 732 hay points. Three had received an A rating and the fourth a B+ rating. The fourth individual also had years of headquarters experience. The candidate chosen to fill the high-level broker field manager position (732 hay points) had received a B+ rating and had managed brokers previously. Finally, Willis chose Bob Dumais (a forty-year-old white male) for the Customer Manager position. Dumais had received a B+ rating and had headquarters experience. All six individuals chosen for these positions were white, five were men, and three were forty or older.

Several of these employees, however, chose to leave the company. One of the account executives resigned. He was replaced by a candidate who had received an A rating, but who also resigned within a month. His replacement was Bryan Hardman, a customer manager from Los Angeles who had received an A rating. In November 1994, when another account executive resigned, he was replaced by Bob Dumais, the previous customer manager, leaving that position open.

Jeney was considered for the vacant customer manager position after his former manager recommended him for it. Quaker decided against Jeney, however, at least in part because it did not consider him to be "promotable." Instead, Rucker chose Ken Oliver (a 34-year-old white male) with a degree in marketing who was pursuing an M.B.A. in the evenings. Jeney was laid off. By the time the RIF was completed, Quaker had laid off two-thirds of its employees aged 40 and older, and one-third of those employees under age 40.

Gentile, a 53-year-old white male, began working for Quaker in 1978 as a sales representative. He was later promoted to customer manager, the position he had when he was discharged in 1994. Gentile's responsibilities involved handling large supermarket accounts for both breakfast and pet foods. Although Gentile's performance had earned him various awards and positive performance reviews, particularly with regard to his relationships with the buyers, Gentile's reviews had recently worsened as his position required greater analytical responsibilities. Quaker also received a complaint about him from an independent broker.

During the 1994 RIF, Quaker evaluated Gentile using the same system employed with Jeney. Gentile received a B rating overall, garnering praise for his customer relationships, but criticism for his analytical skills. In Arizona, where Gentile worked, Quaker filled six sales positions. The first four job openings were for account executives, the fifth position was a broker field manager, and the final opening was for a customer manager. All of these jobs went to employees who had received higher ratings. All six individuals chosen for these positions were white, five were men, and three were forty or older.

3

Coleman, a 49-year-old male, began working for Quaker in 1972. At Quaker, Coleman rose from account representative to account executive, the position he held until he was discharged. Coleman's responsibilities included preparing business planning initiatives and managing relations

with assigned customers. Coleman survived the 1994 RIF that ended the careers of Jeney and Gentile. In fact, at that time Quaker promoted Coleman from customer manager to account executive.

Then, in 1995, Quaker sold its pet foods business and undertook another, smaller RIF, eliminating two sales positions in Phoenix. The four account executives and one customer manager were evaluated by their supervisors, Julie Forbes and Bob Blair. Coleman ranked third with 13 points, placing him in the middle of the group. Lisa Rodriguez (16 points) and Bryan Hardman (14 points) ranked above him; Bob Dumais (12 points) and Ken Oliver (11 points) ranked below him. On the basis of these rankings, Quaker decided to terminate Dumais and Oliver. At this point, however, Forbes, Dumais' supervisor, intervened. She argued that the difference between Coleman and Dumais was only 1 point and resulted from the fact that she was a tougher evaluator than Coleman's supervisor, Blair. Blair and Forbes sparred over whose employee would be kept on, and Blair finally relented. Thus Quaker kept Dumais and discharged Coleman.

Finally, Quaker's national headquarters agreed to allow one more sales position in Phoenix, but only on condition that it rank below account executive in order to keep down costs. Oliver, who had scored lower than Coleman, was kept. Quaker states that it did so because the position was two levels below Coleman's level and would have meant a large pay cut for him. Fearing the loss in morale and knowing that Oliver was already working on the account assigned to that position, Quaker selected Oliver and laid off Coleman.

B

Believing that they had been terminated because of their age, Jeney, Gentile, and Coleman filed complaints with the Equal Employment Opportunity Commission ("EEOC"). On May 27, 1998, the EEOC issued its determination that it found reasonable cause to believe Quaker had discriminated against older employees as a class and had violated the law when it terminated Jeney, Gentile, and Coleman.

In the meantime, in October 1995, Jeney, Gentile, and Coleman, together with seven other plaintiffs, filed this suit in the United States District Court for the District of Arizona. All ten plaintiffs had been fired in the RIFs and all alleged that Quaker fired them because of their age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. Their complaints also included state law claims for breach of contract and discharge in violation of public policy. Quaker moved to sever the cases. The district court granted Quaker's motion on April 8, 1996, ruling that trying the cases together could cause jury confusion and prejudice Quaker. The court ordered the cases sent to the districts in which the plaintiffs had worked for Quaker. Because Jeney, Gentile, and Coleman had worked in Arizona, these cases remained there. The three cases proceeded separately but in close coordination with one another.

On November 11, 1996, Jeney and Gentile, but not Coleman, filed a second complaint with the EEOC charging discrimination on the basis of sex and race. On March 14, 1997, Jeney and Gentile filed a second amended complaint in district court alleging that they had been fired because of their

race and sex in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e.

After a contentious discovery period, both sides moved for summary judgment. On March 10, 1999, the district court granted summary judgment in favor of Quaker on all the claims. The judge assumed Jeney, Gentile, and Coleman had made out a prima facie case of intentional age discrimination, but concluded that they had failed to raise a genuine issue of material fact as to whether Quaker's stated reasons for firing them were pretextual. In addition, the district court found that they had not timely pled age discrimination under the disparate impact theory of liability and rejected their motion to amend their complaint to add this theory.

With respect to Jeney and Gentile, the district court found that their claims of race and sex discrimination were barred by the statute of limitations and that in any case they had not raised a general issue of material fact that they had been discriminated against on these grounds. With respect to Coleman, the judge granted Quaker's motion to strike his statistical evidence because most of the analysis concerned the 1994 RIF, not the 1995 RIF in which Coleman lost his job. The judge also excluded, under Federal Rule of Evidence 408, Quaker's settlement offer made after Coleman had filed his EEOC charge.

As the state law claims rested on the same factual basis as the federal claims, the district court granted summary judgment for Quaker on Jeney's, Gentile's and Coleman's claims that they had been discharged in violation of Arizona public policy and in breach of their employment contract. In

addition, the district court concluded that Quaker's Code of Ethics did not create contractual obligations under Arizona law.[2]

Jeney, Gentile and Coleman timely appealed.

II

A

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual [who is at least 40 years of age] . . . because of such individual's age." *Id.* at §§ 623(a), 631(a). To establish a violation of ADEA under the disparate treatment theory of liability, Jeney, Gentile, and Coleman "must first establish a prima facie case of discrimination. If [they do so], the burden then shifts to [Quaker] to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, [they] must demonstrate that [Quaker's] alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). Despite the burden shifting, the ultimate burden of proof remains always on the former employees to show that Quaker intentionally discriminated because of their age. *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1420-21 (9th Cir. 1990).

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[2]The district court also dismissed Jeney's, Gentile's and Coleman's claims under ERISA, a decision they do not appeal.

To establish a prima facie case using circumstantial evidence, the employees must demonstrate that they were (1) members of the protected class (at least age 40); (2) performing their jobs satisfactorily; (3) discharged; and (4) replaced by substantially younger employees with equal or inferior qualifications. *Nidds v. Schindler Elevator Co.*, 113 F.3d 912, 917 (9th Cir. 1997). In Coleman's case, Quaker appears to concede that he made a sufficient prima facie showing. In Jeney's and Gentile's cases, Quaker does not dispute that they were members of the protected class or that they were discharged. In Jeney's case, with respect to the job performance element, Quaker contends that he had performed satisfactorily in his sales positions, but was not as qualified as other employees for the new, higher-level positions that remained after the RIF. In Gentile's case, with respect to the job performance element, Quaker contends that he had performed satisfactorily in his previous position, but that his performance slipped as this position required greater analytical skill. Quaker states, however, that it did not discharge him for poor performance directly; rather it laid him off as part of the widespread RIF. For both Jeney and Gentile then, the second element of the prima facie case ties into the fourth element, i.e., whether their qualifications were equal to or better than those of the retained employees.

Where, as here, the discharge in question results from a general reduction in workforce, Jeney and Gentile need not show that they were replaced; rather they need show "through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Rose*, 902 F.2d at 1421. This inference "can be established by showing the employer had a continuing need for [their] skills and services in that [their] various duties

were still being performed," *Wallis,* 26 F.3d at 891, or by showing "that others not in [their] protected class were treated more favorably." *Washington v. Garrett,* 10 F.3d 1421, 1434 (9th Cir. 1994).

To establish their prima facie case, Jeney and Gentile offer the following proof: statistical evidence showing that older workers were terminated at twice the rate of younger workers; the EEOC reasonable cause determinations in their cases; the alleged statement by Quaker officials that Jeney was not "young and promotable;" and the fact that younger, less experienced employees than they were kept. "The requisite degree of proof necessary to establish a prima facie case for Title VII and ADEA claims on summary judgment is minimal. . . ." *Wallis,* 26 F.3d at 889.

The statistical evidence is problematic. On its face, the data shows that compared to employees under age 40, nearly twice the percentage of employees over age 40 (the protected class) were laid off. This observation, however, does not take into account any variables other than age. When the statistical expert considered other variables, such as education, the percentage of older employees in eliminated low-level jobs, and the job market, the results were far less dramatic. As the district court found, "When broken down for extensive peer analysis, his results were not even significant." Moreover, the EEOC probable cause determinations in these cases carry little weight since they are conclusory and completely devoid of analysis. Finally, Jeney's and Gentile's subjective evaluations of their relative qualifications and Quaker's alleged use of the phrase "young and promotable" do not take them far. Nevertheless, despite the weaknesses in the evidence offered by Jeney and Gentile to establish their prima

facie cases, given the low threshold required, we assume, without deciding, that all three - Jeney, Gentile and Coleman - have established such a case. A prima facie case raises a rebuttable presumption that Quaker has violated ADEA.

The burden now shifts to Quaker to articulate legitimate, non-discriminatory reasons for the adverse employment action. *See Wallis,* 26 F.3d at 889. Quaker states that it terminated Jeney and Gentile pursuant to a general reduction in its workforce and that it did not select them for any of the remaining positions because they were not as qualified as those employees chosen. It supports its argument that Jeney and Gentile were less qualified than the selected candidates by pointing to its rating system and their work experience. With respect to Coleman, Quaker states that he ranked lower than all employees retained but one in the 1995 ratings system and that the job of that employee was saved after his supervisor fought harder than Coleman's to keep him. A RIF is a legitimate nondiscriminatory reason for laying off an employee. *See Nidds,* 113 F.3d at 918. Furthermore, lack of proper qualifications is such a reason. *See id.* Thus, Quaker has met its burden of production.

At this point in the analysis, the "presumption of unlawful discrimination 'simply drops out of the picture.'" *Wallis,* 26 F.3d at 889 (quoting *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (1993)). To survive summary judgment, the employees must now introduce evidence sufficient to raise a genuine issue of material fact as to whether the reasons Quaker articulated are pretexts for age discrimination. They may rely on the same evidence they used to establish a prima facie case or put forth additional evidence. *See Wallis,* 26 F.3d at 892.

While summary judgment should be used prudently in ADEA cases involving motivation and intent, *see Rose,* 902 F.2d at 1420, the establishment of a prima facie case based on the minimum evidence necessary to raise a presumption of discrimination does not preclude summary judgment. *See Wallis,* 26 F.3d at 890-91; *Lindahl v. Air France,* 930 F.2d 1434, 1437 (9th Cir. 1991) ("[A] plaintiff cannot defeat summary judgment simply by making out a prima facie case."). Jeney, Gentile, and Coleman "must do more than establish a prima facie case and deny the credibility of [Quaker's] witnesses." *Schuler v. Chronicle Broadcasting Co., Inc.,* 793 F.2d 1010, 1011 (9th Cir. 1986). "In response to [Quaker's] offer of nondiscriminatory reasons, [they] must produce 'specific, substantial evidence of pretext.'" *Wallis,* 26 F.3d at 890 (quoting *Steckl v. Motorola, Inc.,* 703 F.2d 392, 393 (9th Cir. 1983)).

1

In response to the reasons articulated by Quaker for laying him off, Jeney puts forth the evidence used to establish his prima facie case and asserts that the system utilized by the company to rate employees in order to decide whom to retain was purposively made subjective so as to provide a "smokescreen" for discrimination on the part of the raters. Thus in determining whether Jeney produced enough specific substantial evidence to raise a genuine question as to whether Quaker's reasons were pretextual, we consider: the statistical evidence; the EEOC determination; Quaker's alleged statement that they wanted someone "young and promotable;" his qualifications relative to those of the retained employees; and evidence regarding use of the rating system as a cover for discrimination.

As noted above, at first blush, the statistical disparity between the effect of the RIF on older and younger workers appears significant. Jeney produced evidence showing that the likelihood that this disparity would occur by chance was 3 in 100 billion. The problem, however, is that Quaker never contends that the disparity occurred by chance; just that it did not occur for discriminatory reasons. When other pertinent variables were factored in, the statistical disparity diminished and finally disappeared. To establish a prima facie case based solely on statistics, let alone raise a triable issue of fact regarding pretext, the statistics "must show a stark pattern of discrimination unexplainable on grounds other than age." *Rose,* 902 F.2d at 1423 (internal quotation marks omitted).

We have previously held that statistics remarkably similar to these failed to raise a triable issue of fact of intent to discriminate. In *Rose*, a vice president whose job had been eliminated when Wells Fargo & Company purchased Crocker National Bank brought suit against Wells Fargo alleging age discrimination. The statistical evidence he proffered to survive the bank's motion for summary judgment revealed that of individuals age 50 or over in the employee's division, 73.5 percent were terminated. In contrast, 34.1 percent of individuals in their 40s were terminated, as were only 28.2 percent of those under age 40. Likewise, Jeney's figures show that 64.4 percent of employees over age 40 were terminated in contrast to 36.8 percent of those under that age. *See Rose,* 902 F.2d at 1423. In *Rose*, we rejected such statistics as insufficient to raise a question of intentional discrimination. *See id.* We pointed to the fact that older individuals tended to occupy the level of positions eliminated during the reorganization. *See id.* Likewise, older individuals tended to occupy the sales positions eliminated and outsourced by

Quaker. Jeney's statistics failed to account for obvious variables - including education, previous position at the company, and distribution of age groups by position - that would have affected the results of the analysis. *See Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994) (holding that to raise an inference of discrimination, statistical evidence should account for possible nondiscriminatory variables); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (refusing to give weight to statistical evidence that does not account for relevant variables). *Cf. Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (Without a showing of causation between the challenged action and the alleged disparities, "employers [would be] potentially liable for the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."). At this point of the disparate treatment analysis, moreover, Jeney's proof must raise questions as to the veracity of the reasons Quaker gave for not retaining Jeney specifically. "While statistics are often probative in determining the existence of a pattern or practice of disparate treatment, their usefulness in proving pretext depends primarily upon their relevance to the specific decision affecting the individual plaintiff, [and not] those that affect [Jeney's] protected class in general." *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 462 (9th Cir. 1987). Because they fail to account for many factors pertinent to Jeney, we conclude that the statistics are not enough to take this case to trial.

Nor does the EEOC reasonable cause determination create a genuine issue of material fact. An EEOC letter is a "highly probative evaluation of an individual's discrimination complaint." *Plummer v. Western Int'l Hotels Co., Inc.*, 656

F.2d 502, 505 (9th Cir. 1981). As required by our case law, the district court properly admitted the letter into evidence. Such letters, however, "are not homogeneous products; they vary greatly in quality and factual detail." *Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984). The EEOC letter in this case stated simply that "The Commission's investigation finds reasonable cause to believe that [Quaker] has violated the [ADEA]. The Commission further finds that employees over the age of 40, as a class, were laid of in violation of [ADEA]." It is impossible from this letter to know what facts the EEOC considered and how it analyzed them. Examining similarly conclusory EEOC letters, other circuits have concluded that when the letters only report "bare conclusions," they have little probative value. *See Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 201-02 (5th Cir. 1992); *see also Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988). In previous cases, we have upheld summary judgment in cases in which the EEOC itself has brought suit. *See, e.g., EEOC v. Insurance Co. of N. Am.*, 49 F.3d 1418 (9th Cir. 1995). If the EEOC's suing is insufficient to create a genuine issue of material fact, then, a priori, a conclusory EEOC reasonable cause letter, at least by itself, does not create an issue of material fact.

Next, Jeney asserts that Quaker refused to hire him because it was looking for someone "young and promotable," or at least that Quaker's use of the word "promotable" was an illegal synonym for "young." Quaker's employees testified to using the word "promotable," but stated that they never used the word "young." Jeney's own testimony is mixed on this issue. Although in his affidavit Jeney stated that he had heard that they had said "young or promotable," he cast doubt on

this declaration when during his deposition he stated that "Boyd said that Rucker told him it had to go to somebody young and mobile or promotable, or whatever term you want to use."[3]

In the context of this case, the word "promotable" by itself does not give rise to an inference of discriminatory motive. As Quaker explained, and Jeney does not contradict, the reorganization of the company eliminated hundreds of low-level positions, the type of jobs that individuals like Jeney once kept for years without any expectation that they would need to advance in the company. Once these positions were farmed out to independent brokers, the remaining positions were higher level: a few customer management positions and many account executive positions. Hence, Quaker expected its customer managers to be promotable to account executive positions within two years. Promotability became an increasingly important consideration in hiring customer managers. *Cf. Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 987 (10th Cir. 1996) (stating that promotability is a legitimate employer consideration). Given this background, none of which is contradicted by Jeney, the use of the word promotable does not give rise to suspicions of age discrimination. Moreover, we have held that the use of far

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[3]Curiously, Jeney's brief does not cite to (nor do his excerpts of record include) the deposition of Steve Shields, a Quaker account executive, who also reported that Quaker's management would not retain Jeney because they wanted someone "younger." In contrast, Gentile does cite to the Shields deposition. The Shields deposition is in the Jeney record, however, and we have considered it.

more suggestive words on the part of management do not create a genuine issue of material fact as to age discrimination. *See Nesbit v. Pepsi Co., Inc.*, 994 F.2d 703, 705 (9th Cir. 1993) (holding that employer's use of the phrase "we don't necessarily like grey hair" did not support an inference of discriminatory motive); *Nidds*, 113 F.3d at 918-19 (holding that employer's use of the phrase "old timers" did not support inference of discriminatory motive); *Rose*, 902 F.2d at 1423 (holding that employer's use of the phrase "old-boy network" did not support inference of discriminatory motive); *Insurance Co.*, 49 F.3d at 1421 (holding that rejecting employee because he was "overqualified" did not support inference of discriminatory motive). *Cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (holding that even adverse employment actions motivated by factors strongly correlated with age are not illegal under ADEA). Although Jeney has proffered sufficient evidence to raise a question of fact as to whether one member of Quaker's management used the words "young and promotable," this is not sufficient to raise a question of fact as to whether the reasons Quaker gave for laying Jeney off were pretexts for age discrimination. *See Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990) (holding that the hiring supervisor's statement that he hired another employee over the plaintiff because he was "a bright, intelligent, knowledgeable young man" was not enough to raise an inference of age discrimination).

Fourth, Jeney attacks the rating system used by Quaker as subjective and thus a cover for age discrimination. While a subjective evaluation system can be used as cover for illegal discrimination, subjective evaluations are not unlawful per se and "their relevance to proof of a discriminatory intent is weak." *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d

1072, 1075 (9th Cir. 1986). Most of Jeney's criticism of the ratings system centers on his contention that it did not do a good job of evaluating the employees and other methods, such as standardized testing, would have done better. Jeney's expert witnesses concluded as much. But this allegation does little to help Jeney establish that Quaker used a subjective system in order to discriminate against older employees. That Quaker made unwise business judgments or that it used a faulty evaluation system does not support the inference that Quaker discriminated on the basis of age. *See Sharpe v. AT&T Co.*, 66 F.3d 1045, 1050 (9th Cir. 1995) (applying state law); *Cotton v. City of Alameda,* 812 F.2d 1245, 1249 (9th Cir. 1987) ("The ADEA does not make it unlawful for an employer to do a poor job of selecting employees. It merely makes it unlawful to discriminate on the basis of age."). Jeney offers one item of proof that could create such an inference: employees over age 40 received significantly lower rankings on average than employees under age 40. Ultimately though, these statistics suffer from the same infirmity as the statistics regarding the layoffs - they do not account for any relevant factors that might explain the variation.

Fifth, Jeney asserts that younger, less qualified individuals were hired for the jobs for which he was qualified. As evidence of his qualifications, Jeney relies primarily on his years of experience and his strong performance reviews. But "the question is not whether [Jeney] in the abstract had better qualifications than the other candidates. The question is whether the other candidates are more qualified with respect to the criteria that [Quaker] actually employs." *Cotton,* 812 F.2d at 1249 (rejecting the ADEA claim of an employee who argued he had more experience than those hired). Jeney's "subjective personal judgments of [his] competence alone do

not raise a genuine issue of material fact." *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th Cir. 1996).

Of the six jobs filled in the Phoenix area following the ratings, four were account executive positions. These positions would have required a promotion of four levels for Jeney. As Jeney himself attests, such a promotion is unheard of in the company. The fifth position - broker field manager - would have also represented a comparable promotion. This left the opening for a customer manager, a job requiring a one-level promotion and a position for which Jeney was considered. Thus, Jeney must raise a genuine issue that Quaker's reasons for hiring others instead of him for the customer manager position are pretexts. Jeney argues that he was more qualified than Lisa Rodriguez, Bryan Hardman, Glen Synoground, Robert Dumais, Ken Oliver, and Stacey Ring. First, Rodriguez, Hardman, and Synoground were hired as account executives, the position four levels above Jeney's. Rodriguez had already held a comparable position to the senior account executive job she was given. Robert Dumais, a 40-year-old white male who had already held an account executive position in San Antonio, was selected as a customer manager, but within months was promoted to account executive when another employee retired.

Ken Oliver, a 34-year-old white male with a degree in marketing and who was studying for his M.B.A. during the evenings, fit Quaker's emphasis on analytical skills. Quaker stated that it also hired Oliver on the basis of a recommendation from an outside broker who knew both Oliver and Jeney. *Cf. Merrick,* 892 F.2d at 1437 (stating that the hiring supervisor may properly rely on the recommendation of others in making his decision). Quaker

believed he was more likely than Jeney to be promoted to account executive, an important consideration in the new company. Stacey Ring, a 26-year-old white female, had a degree in quantitative economics and Quaker believed she was more qualified that Jeney to participate in analytical projects at headquarters.

Jeney's subjective evaluation of his qualifications cannot raise an issue of material fact, and the one non-subjective qualification he points to is his number of years of experience. All but one of these years of experience was as a sales representative. The little headquarters experience Jeney did have came as an assistant for a year to two supervisors and involved making schematics for shelf placement. *See Merrick,* 892 F.2d at 1438 (holding that a plaintiff has not raised an inference of discrimination where he introduces evidence that he may have been more qualified in some respects than the chosen employee, but introduces no evidence that the company's stated reasons for not hiring him were pretextual); *Cotton,* 812 F.2d at 1249 (holding that the number of years of experience is not relevant where this is not one of the qualifications sought by the employer). Furthermore, his case is weakened by the fact that Ken Willis, who created the special ARM position for Jeney in 1993, was the same individual who made the decision not to rehire him initially. "Where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive." *Bradley,* 104 F.3d at 270-71. In both *Bradley* and in Jeney's case, the decisions to hire and then to terminate were about a year apart. *See id.* at 269.

Finally, Jeney attacks many of the grounds Quaker gives for firing him because he was not told of these reasons when he was let go. Jeney is correct that doubt is cast on an employer's proffered reasons for why an employee was laid off where a straightforward answer was not given when he or she was terminated, but later is provided during litigation. *See Lindhal,* 930 F.2d at 1438 ("The computer explanation would have been such a straightforward answer to [the employee's] inquiries that one might expect that [her supervisors] would have mentioned it if it really were the explanation."). In Jeney's case, however, Quaker informed all the employees that they were being terminated pursuant to the RIF in which low-level sales positions were eliminated and the employees retained would be in higher level supervisory or management positions. The ratings systems Quaker used to help determine who remained included many of the specific reasons Quaker gave during the litigation to explain why Jeney was not as qualified as other employees, including Jeney's lack of headquarters experience and skills and the fact they considered him unlikely to be promoted. As the later reasons mainly detail the earlier one, they are "not properly described as 'shifting reasons.'" *Nidds,* 113 F.3d at 918 (holding that employer's first explanation that "lack of work" was the reason for the layoffs and later statement that "lack of seniority and poorer performance relative to other mechanics" was the reason for the particular employee's termination did not create a genuine issue of material fact as to whether employer's reasons were pretextual). Quaker has consistently explained that the reorganized company required employees with increased analytical abilities. Jeney has not cast doubt on the sincerity of this explanation or on Quaker's conclusion that his skills were not as strong in this area as those of the individuals retained.

Jeney had over twenty years of experience as a sales representative. But Quaker was no longer employing sales representatives. Their responsibilities were filled by outside brokers. All of the positions at Quaker now required the employees to have analytical and management skills. In the RIF context, Jeney must show that the skills he had continued to be needed by the company. "Without the demonstration of a need for the same services and skills that [Jeney] possessed," Jeney's case falters. *Sengupta,* 804 F.2d at 1075. Jeney has not made such a demonstration. Simply put, Quaker no longer employed anyone to do the job Jeney had done for over 20 years. "'In a reduction-in-force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated. . . . If [Jeney] cannot show that [Quaker] had some continuing need for his skills and services in that his various duties were still being performed, then the basis of his claim collapses.'" *Rose,* 902 F.2d at 1421 (quoting *Leichihman v. Pickwick Int'l,* 814 F.2d 1263, 1270 (8th Cir. 1987)).

To survive summary judgment, the burden is on Jeney to "produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for [his] discharge was false, or (b) that the true reason for his discharge was a discriminatory one." *Nidds,* 113 F.3d at 918. Looking at the evidence in the light most favorable to Jeney, no reasonable juror could conclude - on the bases of the statistics that did not account for obvious factors, the evidence regarding Quaker's use of "promotable" or "younger," Jeney's own evaluations of his relative qualifications, and his assertion that the ratings were unduly subjective - that Quaker intentionally discriminated against him because of his age.

Thus, we affirm the district court's grant of summary judgment on Jeney's disparate treatment claim under ADEA.

2

Gentile makes essentially the same case as Jeney does in opposing summary judgment on whether Quaker's reasons for firing him are pretexts for age discrimination. To the extent that Gentile's case rests on the statistical evidence, the EEOC determination, Quaker's alleged statements regarding Jeney's youth and promotability, and the rating system, and his contention that Quaker's stated reasons for terminating him have shifted, we reject it for the reasons explained with respect to Jeney. Gentile's assertion that Quaker hired younger, less qualified individuals for the jobs for which he was qualified, however, requires separate analysis.

As evidence of his qualifications, Gentile relies primarily on his years of experience as a customer manager and his strong performance reviews. But as with Jeney "the question is not whether [Gentile] in the abstract had better qualifications than the other candidates. The question is whether the other candidates are more qualified with respect to the criteria that [Quaker] actually employs." *Cotton,* 812 F.2d at 1249. In addition, his more recent performance reviews reveal that Gentile failed to conduct analyses and improperly focused on sales volume rather than profitability.

Of the six jobs filled in the Phoenix area following the ratings, four were account executive positions, one was for a broker field manager, and one for a customer manager. Gentile asserts that he is more qualified than three individuals chosen for the Phoenix office: Lisa Rodriguez, Bob Dumais

and Glen Synoground. He also states that he is more qualified than two other employees retained in the Los Angeles office as customer managers: Bryan Hardman and Stacey Ring.

Lisa Rodriguez and Glen Synoground were retained as account executives, positions which would have required a promotion for Gentile. While Gentile was a customer manager, Rodriguez was already a senior account executive and Synoground an account executive before the 1994 RIF. Quaker's failure to fire two higher ranking employees in order to promote Gentile in the midst of a large restructuring involving hundreds of layoffs does not raise an inference of discrimination. All three of the remaining employees hired as customer managers rated higher than Gentile; there is ample evidence of Gentile's weak analytical abilities, a crucial consideration at a time when the nature of the job was changing. Two of the individuals retained as customer managers, Hardman and Ring, worked in the Los Angeles office. We have previously noted that a company need not transfer an employee to another office during a RIF in order to retain him. *See Rose,* 902 F.2d at 1422. During the 1994 nationwide RIF, no employee who received Gentile's low rating was moved to another office. Bob Dumais, retained as a customer manager, had already held an account executive position in the San Antonio office. Gentile proffers no evidence that his analytical abilities are superior to those of the employees Quaker retained, the very skills Quaker has given as the rationale for its employment decisions. Gentile's "subjective personal judgments of [his] competence alone do not raise a genuine issue of material fact." *Bradley,* 104 F.3d at 270. Furthermore, Ken Willis, who in 1993 retained both Gentile and Coleman over a third employee when one of three positions was eliminated, was the supervisor responsible for

filling the positions for which Gentile was not selected in 1994. As with Jeney, this fact gives rise to an inference that no discrimination took place. *See id.* at 270-71.

Like Jeney, Gentile has failed to "produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for [his] discharge was false, or (b) that the true reason for his discharge was a discriminatory one." *Nidds*, 113 F.3d at 918. Accordingly, the district court did not err when it granted Quaker's motion for summary judgment with respect to Gentile's ADEA claim of disparate treatment.

3

Although Coleman was terminated a year later during the 1995 RIF, his case remains analytically similar to those of Jeney and Gentile. Quaker assumes, as will we, that Coleman has established a prima facie case of disparate treatment on the basis of age. Quaker states that it had initially decided to retain Coleman over another employee, Bob Dumais, in 1995, but terminated him after Dumais' supervisor fought harder than Coleman's to save his job. In response to the explanation articulated by Quaker for laying him off in 1995, Coleman puts forth the following evidence: statistics regarding the 1994 RIF; the EEOC finding of reasonable cause; Quaker's retention of younger, less experienced employees; and Quaker's settlement offer.

We have already addressed the weaknesses of the statistical evidence in the context of Jeney's case. In Coleman's case, the district court struck this evidence from the record. The court noted that almost all the analysis was

based on the 1994 data, that the limited analysis of the 1995 data considered no relevant variables, and that the 1995 data analysis included all post-1994 terminations, not just the 1995 RIF discharges. Although Coleman uses the evidence in his brief to our court, he never challenges the district court's order striking the evidence. Accordingly, he has waived this issue, and the statistical evidence cannot be considered part of the record. *See Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999).[4] Therefore, Coleman's attack on the subjective nature of the rating system is besides the point. Moreover, Coleman's 1994 promotion indicates that he benefitted from this system.

The EEOC reasonable cause determination is as conclusory in Coleman's case as it is in Jeney's and Gentile's. In fact it appears to have been a form letter. Indicative of its conclusory nature and lack of probative value, the EEOC letter in Coleman's case includes the recitation that Quaker discriminated against older employees as a class despite the fact that there was no class in 1995 when Coleman was terminated. Coleman was the only employee laid off in that RIF who filed an EEOC charge, and the EEOC had no information regarding other employees terminated that year.

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[4]Even in his reply brief, Coleman does not directly challenge the district court's order striking the evidence, although he does cite to cases supporting the proposition that evidence of past discrimination can be relevant to a later case. In any case, issues cannot be raised for the first time in a reply brief. *See Alaska Ctr.*, 189 F.3d at 858 n.4.

Like Jeney and Gentile, Coleman asserts that younger, less qualified individuals were retained in jobs for which he was qualified. Specifically, Coleman points to Lisa Rodriguez, Bart Wassom, Quentin Burrell, Bryan Hardman, Robert Dumais, and Ken Oliver. As evidence of his qualifications, Coleman relies primarily on his years of experience and his strong performance reviews. In order to survive summary judgment, Coleman must raise a genuine issue of material fact as to whether the reasons Quaker has given for retaining these six individuals instead of him are pretexts. First, Coleman concedes that he should not have been retained over Rodriguez. Second, Bart Wassom and Quentin Burrell were not hired in Phoenix, they were hired in Los Angeles. Quaker had no duty to transfer Coleman to another part of the country. *See Rose,* 902 F.2d at 1422 ("When an employer reduces its work force for economic reasons, it incurs no duty to transfer the employee to another position within the company."). In the 1995 RIF, the decisions on which employees to retain were purely local. Quaker did not transfer employees to other regions when it discharged Coleman. Coleman points to no evidence to the contrary.

Despite Coleman's assertion that he was more qualified than Hardman, Hardman scored higher in the 1995 ratings. Unlike Jeney and Gentile with respect to the 1994 evaluations, Coleman does not attack the ratings method used in the 1995 RIF as a cover for age discrimination. We have held that where the plaintiff does not even attack the selection criteria as having a disparate impact on the protected class, "we will not second guess the selection criteria used by an employer." *Cotton,* 812 F.2d at 1249. Quaker has said that it retained Hardman because he was more qualified. Hardman

scored better than Coleman, and Coleman does not challenge the rating as biased. Coleman's "subjective personal judgments of [his] competence alone do not raise a genuine issue of material fact." *Bradley,* 104 F.3d at 270.

Coleman and Dumais competed for the final position. Quaker initially selected Coleman. After a protracted struggle between their respective managers, Forbes, Dumais's manager, won out. Dumais was retained and Coleman discharged. Coleman points to no evidence that this account is not credible. He states only that Forbes's statements may be believed or disbelieved by the jury. This is not enough to withstand summary judgment. *See Wallis,* 26 F.3d at 890 ("[The plaintiff] must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses."); *Lindahl,* 930 F.2d at 1437-38 ("The plaintiff cannot carry this burden simply by restating the prima facie case and expressing an intent to challenge the credibility of the employer's witnesses on cross-examination."). Nor, in the context of this decision, are his assertions that he is more qualified than Dumais to the point. In this case, Quaker admits that Coleman scored one point above Dumais. In fact because of this, it had initially decided to retain Coleman. Quaker's legitimate, non-discriminatory reason is that Forbes convinced Coleman's manager that Dumais should be kept over Coleman, and Coleman has introduced no evidence to cast doubt on this version of the hiring decision. The "favoritism" of managers is "not age discrimination." *Shutt v. Sandoz Crop Protection Corp.*, 944 F.2d 1431, 1433 (9th Cir. 1991).

The last employee to whom Coleman points as less qualified than he is Oliver. Quaker admits that Oliver, a

customer manager, is less qualified in the abstract than Coleman, an account executive, but states that because of this Oliver was a more appropriate fit for the customer manager position. For Coleman to take the position would have meant a demotion and a sharp cut in salary. While we have recognized that "overqualification" as a reason for firing an employee may be a mask for age discrimination, an employer may choose not to hire an employee because he is overqualified for a position without violating ADEA. *See Insurance Co.*, 49 F.3d at 1420-21. This is particularly true where the criteria that make the employee overqualified and the reasons for the employer's concern are defined. *See id.* at 1421. Here, Coleman does not contradict Quaker's argument that placing him in this position would have meant a large pay cut and a two-step demotion. Coleman's previous position as an account executive is an objective criterion and Quaker defined its concern that a demotion would have meant a loss of morale. Thus explained, Quaker's rejection of Coleman as overqualified is a legitimate nondiscriminatory reason and Coleman has introduced no evidence controverting Quaker's position on this issue which would allow him to survive summary judgment. *See id.* In sum, Coleman has not raised a genuine issue of fact as to whether the reasons Quaker gave for not retaining him instead of these six employees were pretextual.

Finally, Coleman argues that the district court should have admitted into evidence Quaker's offer of additional medical benefits in exchange for Coleman's release of claims against the company. The district court excluded this evidence

under Federal Rule of Evidence 408.[5] In *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338 (9th Cir. 1987), we created an exception to the general rule against admitting offers to settle a case. In *Cassino*, we held that it is not an abuse of discretion for the trial judge to admit evidence of an employer's offer of a "severance pay package in exchange for a release of all potential claims" when the offer is "contemporaneous" with the termination of the employment relationship. *Id.* at 1342. The court made clear, however, that offers made "in connection with the negotiation and settlement of disputes arising after the termination" remain inadmissable. *Id.* Thus, where an employer offered outplacement services, in addition to its ordinary severance package, three weeks after the employee's discharge in exchange for a release, the district court properly excluded evidence of the offer even where the employee had yet to file any claims. *See Mundy v. Household Finance Corp.*, 885 F.2d 542, 546-47 (9th Cir. 1989).

In Coleman's case, he had been informed in March 1995 of his discharge and he received his severance package without condition. On May 8, he filed his age discrimination charge with the EEOC. On May 12, Quaker offered him additional medical benefits in exchange for a release of claims. As the settlement offer was not contemporaneous with termination and the consideration was additional to the standard severance benefits, the district court did not abuse its

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[5] "Evidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." Fed. R. Evid. 408.

discretion in excluding the offer. *See Mundy,* 885 F.2d at 547. Coleman's contention that the district court should not have excluded the evidence because Quaker may not have known of the EEOC charge when it made him the offer is foreclosed by *Mundy*. In *Mundy*, the plaintiff had only hired an attorney; he had not brought a charge, much less made his charge known to the company. *See id.* Still, we held that the trial judge did not abuse his discretion in excluding the evidence. *See id.* Here, Coleman had already filed his charge with the EEOC. Accordingly, this evidence cannot be considered to determine whether Coleman has raised a genuine issue of material fact.

To survive summary judgment, the burden is on Coleman to "produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for [his] discharge was false, or (b) that the true reason for his discharge was a discriminatory one." *Nidds,* 113 F.3d at 918. Looking at the evidence in the light most favorable to Coleman, no reasonable juror could conclude - on the basis of the EEOC determination and the evidence regarding the reasons for Quaker's hiring decisions - that Quaker intentionally discriminated against him because of his age. Thus, we affirm the district court's grant of summary judgment on Coleman's ADEA disparate treatment claim.

III

When challenging an adverse employment action under the ADEA, an employee may proceed under two theories of liability: disparate treatment or disparate impact. Under the disparate impact theory, employees must prove that a facially neutral employment practice had a discriminatory

impact on older workers. *See Rose,* 902 F.2d at 1421. They need not prove motive or intent, but the company can defend by establishing that the challenged practice was based on legitimate business reasons, such as job-relatedness or business necessity. *See id.* at 1424. At that point, the employee would have to show that other selection practices could serve the same business interest identified by the company without having a discriminatory effect. *See id.*

The district court dismissed Jeney's, Gentile's, and Coleman's disparate impact claims on the grounds that they had not pled this theory of liability in their complaint. Jeney, Gentile and Coleman do not dispute that neither their first nor second amended complaints included this theory of liability. They admit that the first time they raised this claim was in their motions for summary judgment. Rather, the employees argue that either they need not specifically allege the disparate impact theory in the complaint or the district court should have allowed them to amend their complaints to add this theory at the summary judgment stage.

We have yet to decide whether both theories of liability - disparate impact and disparate treatment - must be alleged in the complaint in order to provide the basis for later trial or summary judgment.[6] *But cf. Klein v. Boeing Co.,* 847

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[6]The lack of case law on this issue in the courts of appeal stems in large part from the fact that several of our sister circuits do not recognize a disparate impact cause of action under ADEA after *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993). *See, e.g., Ellis v. United Airlines, Inc.,* 73 F.3d 999 (10th Cir. 1996); *Gehring v. Case Corp.,* 43 F.3d 340 (7th Cir. 1994). We have continued to assume that this theory is still viable after *Hazen. See Mangold v.*

F. Supp. 838, 844 (W.D. Wash. 1994) ("Klein never asserted this claim prior to his opposition to Boeing's motion for summary judgment, nor has he moved to amend his complaint to add such a claim. Thus, this claim is not properly before the court."). Jeney, Gentile, and Coleman rely on *Gomes v. AVCO Corp.*, 964 F.2d 1330 (2nd Cir. 1992), for the proposition that disparate impact need not be separately alleged. In *Gomes*, the district court had dismissed the discriminatory impact theory of liability because it found that the plaintiff had not raised it in his EEOC compliant, which must be filed before a case is brought. *See id.* at 1334. Reversing, the Second Circuit held that Gomes' EEOC complaint would have caused the defendant reasonably to expect that the discriminatory impact of its facially neutral rule would also be investigated by the EEOC. *See id.* The employees argue that, similarly, the allegation of discriminatory treatment in their district court complaint gave Quaker notice that both theories of liability could be pursued.

Thus the issue is whether Jeney, Gentile and Coleman, having failed to allege the discriminatory impact theory of liability, may nevertheless proceed under that theory after the close of discovery in their motion for summary judgment. Their case is more akin to *Josey v. John P. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993). In *Josey*, the Third Circuit held that where a plaintiff sets forth only the disparate treatment theory in his pleadings and does not move to amend his complaint until summary judgment following the close of discovery, the plaintiff is barred from proceeding on the disparate impact theory. *See id.* at 641-42. The court reasoned

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California Pub. Util. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995).

that adding a new theory of liability at the summary judgment stage would prejudice the defendant who faces different burdens and defenses under this second theory of liability. *See id.* at 642. The court held that the plaintiff should have moved to amend his pleadings during discovery. *See id.*; *see also Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745, 760-61 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2nd Cir. 1999).

We agree. Allowing Jeney, Gentile and Coleman to proceed with their disparate impact theory after the close of discovery would prejudice Quaker. A complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations. A disparate impact theory, lacking the requirement that the plaintiff prove intent and focusing on statistical analyses, requires that the defendant develop entirely different defenses, including the job relatedness of the challenged business practice or its business necessity. Neither of these are necessary to defend against a disparate treatment theory. This case illustrates the problem. At no time prior to summary judgment, did Jeney, Gentile, or Coleman identify which facially neutral Quaker employment practice they challenged as having a discriminatory impact. *Cf. Josey*, 996 F.2d at 642. The district court judge's opinion indicates that after more than two years of discovery, he had no idea until the employees' motions for summary judgment were filed that they intended to pursue this legal theory. The lack of notice on this issue central to the cause of action makes it difficult, if not impossible, for Quaker to know how to defend itself. After having focused on intentional discrimination in their complaint and during discovery, the employees cannot turn around and surprise the company at the summary judgment

stage on the theory that an allegation of disparate treatment in the complaint is sufficient to encompass a disparate impact theory of liability.

The Second Circuit's decision in *Gomes* does not teach otherwise. *See Kalsi*, 62 F. Supp. 2d at 760-61 (following *Josey* in the Eastern District of New York). *Cf. AFSCME v. County of Nassau*, 96 F.3d 644, 647 (2d Cir. 1996) (stating in its recitation of the facts that "because AFSCME never amended its complaint to adequately plead a disparate impact claim, AFSCME was required to introduce evidence from which it could be inferred that the County intentionally discriminated in setting the pay scale in order to prevail under a disparate treatment theory."). In *Gomes*, the district court had dismissed the complaint containing both theories of ADEA liability because it was broader than the plaintiff's EEOC charge. *Gomes* did not confront the very different situation we face here in which the plaintiffs proceeded at summary judgment on a new theory. An EEOC charge leads only to an investigation, and once a complaint is filed in court, the defendant has ample opportunity to prepare its defenses during discovery. Thus the concerns that animated the Third Circuit in *Josey* were not present in *Gomes*. In *Gomes*, there had been no discovery, and the parties had not spent years developing the evidence to prove their cases.

The dissent cites two Ninth Circuit cases, one which is not relevant and another which supports our holding. First, the dissent urges that the language of a footnote in *EEOC v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641(9th Cir. 1993), be applied outside of the very limited and special context of that case. See post at 14960-61. *Local 350* reversed the district court's grant of summary judgment in favor of the

union on the EEOC's action under ADEA. *See id.* at 643. While *Local 350* was pending, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), was decided. *Hazen*, as noted in *Local 350*, set forth "the parameters of disparate treatment in the age discrimination context." *Id.* 998 F.2d at 648 n.2. The court also noted *Hazen*'s articulation of the disparate impact claim.[7] *See id.* In this same footnote, the panel acknowledges that "both theories were potentially available to the EEOC." *Id.* The court then remanded to the district court with the exceptional order to "direct the EEOC to articulate its theory or theories of discrimination in accordance with the principles set forth in Hazen." *Id.*

The principles set forth in *Hazen*, as discussed in *Local 350*, concerned the requirements for disparate treatment and disparate impact claims. *See id.* The court recognized that the EEOC filed its complaint prior to the decision in *Hazen* and amid confusion of what claims were cognizable under the ADEA. The remand order gave the EEOC an opportunity to articulate its claims in light of Hazen's explication of potential ADEA claims. Plaintiffs filing ADEA claims after *Hazen* would presumably be aware of their potential *Hazen*-based claims. Since Jeney's, Gentile's, and Coleman's complaints were filed after *Hazen* was decided, the footnote in *Local 350* cited by the dissent is simply not applicable to them.

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[7]*Hazen*, while discussing the requirements of a disparate impact claim, specifically left open the question of whether such a claim was cognizable under the ADEA. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604. We have continued to assume that this theory is still viable after *Hazen*. *See Mangold v. California Pub. Util. Comm'n*, 67 F.3d 1470 (9th Cir. 1995).

The dissent also incorrectly relies on *Arnett v. California Public Employees Retirement System*, 179 F.3d 690 (9th Cir. 1999), *vacated and remanded on other grounds*, (2000), to support its proposition that unspecific statements in the pleadings will suffice to raise a claim of disparate impact. See post at 14961-62. *Arnett*, however, supports our analysis. There, the court reversed the district court's dismissal of plaintiff's disparate impact and disparate treatment claims. *See id.* at 692. The facts of *Arnett* are vastly different from those here. First, in *Arnett*, the plaintiffs had pled a "disparate impact" claim. *See id.* at 693. Second, the court determined that the pleading was sufficient because the plaintiffs alleged "that the consequences of [the disputed practice] fell more harshly on those employees hired at age 40" and had documented the impact of the disputed practice. *Id.* at 697. Here, the plaintiffs have not fulfilled any of the conditions examined by the court: They have not stated that they were alleging a "disparate impact" claim, nor alleged that the consequences of a practice fell more harshly on them, nor provided documentation of the disparity with their complaint.

Thus, we hold that the plaintiffs, who clearly stated ADEA claims of disparate treatment but sought also to pursue claims of disparate impact, were required either (1) to plead the additional disparate impact theory in their complaints, or (2) to make known during discovery their intention to pursue recovery on the disparate impact theory omitted from their complaints. Only if the defendants have been put on notice may the plaintiffs proceed on a disparate impact theory at the summary judgment stage. Because Jeney, Gentile and Coleman raised the disparate impact theory of liability for the

first time at summary judgment, the district court did not err when it did not allow them to proceed on it.[8]

IV

Jeney, Gentile, and Coleman argue that, even if they are required to plead the disparate impact theory in their complaints, the district court should have granted their motions to amend their pleadings to include such a claim. The employees moved to amend their complaints in their replies to Quaker's response to their motion for summary judgment. The district court denied their motions because they did not show good cause for failing to amend their complaints earlier.

Generally, Federal Rule of Civil Procedure 15(a) liberally allows for amendments to pleadings. In this case, however, the district court correctly found that it should address the issue under Federal Rule of Civil Procedure 16 because it had filed a pretrial scheduling order that established a timetable for amending the pleadings, and the deadline had expired before Jeney, Gentile, and Coleman moved to amend.

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[8]*Palmer v. United States*, 794 F.2d 534 (9th Cir. 1986), raised in the employees' reply briefs, is not to the contrary. In Palmer, the district court considered the disparate impact claim despite the fact that it was not specifically alleged in the complaint because the attachments submitted with the complaint raised the theory. *See id.* at 538. The defendants did not challenge this action, and we only mentioned it as a recitation of the facts. *See id.* In contrast, Jeney, Gentile, and Coleman gave Quaker no notice either in the complaint, in documents submitted with the complaint, or in any document prior to their motions for summary judgment that they intended to argue this theory.

See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 607-09 (9th Cir. 1992). Under Rule 16(b), Jeney, Gentile, and Coleman must show good cause for not having amended their complaints before the time specified in the scheduling order expired. *See id.* at 608-09. This standard "primarily considers the diligence of the party seeking the amendment." *Id.* at 609.

Jeney, Gentile, and Coleman did not move to amend their complaints to add the disparate impact theory of liability until their reply to Quaker's motion for summary judgment. Despite having hired a statistical expert years before the summary judgment motions and having received the first statistical report noting the disparities between the retention of older and younger employees over a year before filing for summary judgment, the employees had never moved to amend their complaints. In fact, Jeney and Gentile had the statistical report before they amended their complaint to add the Title VII allegations. Jeney, Gentile, and Coleman do not offer any explanation for their failure to amend their complaints earlier. *See Acri v. International Ass'n of Machinists and Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) (stating that even under the liberal Rule 15 standard "late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action."). Moreover, granting the request to amend the complaint would likely have required reopening discovery so that Quaker could develop its evidence to prepare its defenses to this theory. "A need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice from a delayed motion to amend the complaint." *Lockheed Martin Corp. v. Network*

Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999). This prejudice to Quaker, although not required under Rule 16(b), supplies an additional reason for denying the motion. *See Johnson*, 975 F.2d at 609. Because Jeney, Gentile, and Coleman have failed to show diligence, "the inquiry should end." *Id.* Thus, the district court did not abuse its discretion when it denied their motions to amend their complaints.

V

A

In Jeney's and Gentile's original discrimination claims with the EEOC, they charged only that they had been discriminated against because of their age. During discovery, they came upon a document entitled "Workforce 2001" describing Quaker's goals for a workforce diverse in terms of race and sex. Jeney and Gentile then filed an additional complaint with the EEOC charging that they had been discriminated against because they were white males and filed a second amended complaint alleging that Quaker had violated 29 U.S.C. § 2000e ("Title VII").[9] The district court allowed this amendment, but then granted summary judgment to Quaker on this issue on the grounds that their allegation was untimely. Alternatively, the judge ruled that Jeney and Gentile could not make out a prima facie case of race or sex discrimination.

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[9]Coleman never filed this additional charge with the EEOC or moved to amend his complaint to allege Title VII violations.

B

The analysis under Title VII is the same as that under ADEA. *See Wallis,* 26 F.3d at 888. Thus, because Jeney and Gentile were fired in the context of the RIF, they must produce statistical, direct or circumstantial evidence that their "discharge occurred under circumstances giving rise to an inference of" discrimination on account of race or sex. *Id.* at 891. Despite the fact that the standard is very low, they can not meet it. In contrast to their age discrimination claims, Jeney and Gentile have no statistics that demonstrate any sort of disparate treatment in layoffs on the basis of race or sex. Of the six positions filled in Phoenix for which Jeney might have been considered, all six went to other white employees, five of whom were men. Of the ten employees retained by Quaker and mentioned by Gentile as his competition, nine were white and eight were men.

To support an inference of discrimination, Jeney and Gentile point only to the existence of the Workforce 2001 program, with its stated goal of increasing diversity in management, and to the fact that the RIF was monitored to determine whether it had any impact on women or minorities. Quaker states that it never acted pursuant to the affirmative action plan or the monitoring during the RIF. Jeney and Gentile point to no evidence showing that they were affected by the Workforce 2001 plan or the monitoring. Furthermore, they do not point to any evidence showing that Quaker took any action in response to its monitoring of the RIF. "The mere fact of an affirmative action plan's existence is not relevant to proving discrimination unless the employer acted pursuant to the plan." *Cerrato v. San Francisco Community College Dist.,* 26 F.3d 968, 976 (9th Cir. 1994). Because

Jeney and Gentile have not raised a question of material fact as to whether they were discriminated against on the basis of their age and sex, the district court did not err when it granted summary judgment in favor of Quaker on this claim.[10]

VI

Jeney, Gentile, and Coleman argue that the district court improperly severed their original case, along with seven other plaintiffs, against Quaker. Under Federal Rule of Civil Procedure 20, joinder is proper if (1) the plaintiffs asserted a right to relief arising out of the same transaction and occurrence *and* (2) some question of law or fact common to all the plaintiffs will arise in the action. *See* Fed. R. Civ. P. 20(a); *Desert Empire Bank v. Insurance Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980). Even once these requirements are met, a district court must examine whether permissive joinder would "comport with the principles of fundamental fairness" or would result in prejudice to either side. *Desert Bank,* 623 F.2d at 1375. Under Rule 20(b), the district court may sever the trial in order to avoid prejudice. *See* Fed. R. Civ. P. 20(b).

Ten plaintiffs joined in the first complaint. All ten were fired in the RIFs and all ten alleged age discrimination. Considering Quaker's motion for severance, the district court first found that the plaintiffs' case met both prongs of Rule 20(a). The court then examined the potential prejudice to

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[10]Because we conclude that Jeney and Gentile have not made out a prima facie case of discrimination of the basis of their race or sex, we do not reach the issue of whether they filed their EEOC charges in a timely fashion.

Quaker resulting from joinder and concluded that severance was appropriate. The district court found that Quaker would be prejudiced by having all ten plaintiffs testify in one trial. *See Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 n.4 (E.D. Pa.) (stating that "even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant laid him off because of his age"), *aff'd*, 639 F.2d 774 (3d Cir. 1980). In addition, the district court emphasized the danger of jury confusion. For each plaintiff, the jury would have had to examine individually his or her employment history as well as the explanations given by Quaker for not retaining him or her, explanations that would require the testimony of each employee's supervisors and raters. Legal confusion was also likely because the plaintiffs had worked for Quaker in six different states, and the jury would have had to evaluate their state law claims in light of the different laws of each state. The court found that the likelihood of prejudice and confusion outweighed the gains from judicial economy and any potential prejudice to the plaintiffs who would try their cases in the states in which they lived and worked.

Jeney, Gentile, and Coleman argue now that the district court abused its discretion because severing the cases led to duplicative discovery. As noted above, the court weighed the interests of judicial efficiency and found them outweighed by the potential prejudice to Quaker. Discovery in this case was not as duplicative as it might first appear. Jeney, Gentile, and Coleman, whose cases remained before this district court in Arizona, benefitted from common discovery and counsel, completely coordinating their cases. The district court properly considered the potential prejudice to Quaker created by the parade of terminated employees and

the possibility of factual and legal confusion on the part of the jury. Given the broad discretion with which the district court is vested to make a decision granting severance and the fact that the district court carefully weighed the arguments in favor of and against joinder, we conclude that the district court did not abuse its discretion when it granted Quaker's motion to sever the cases.

VII

Jeney, Gentile, and Coleman contend that the district court abused its discretion when it refused to sanction Quaker for its delays in producing documents. We will not disturb the district court's decisions with respect to sanctions "unless we have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997). We have reviewed the record and fully considered the employees' argument in this regard, as well as Judge Broomfield's conclusions. In addition to the six specific rulings appealed by the employees, Judge Broomfield considered many motions by the employees to compel evidence and to sanction Quaker. His orders and the correspondence between the attorneys reveal this to have been an acrimonious discovery process. At times Judge Broomfield granted the employees' requests for attorney's fees as sanctions, more often he did not and ordered the parties to cooperate with each other. Throughout these proceedings, he properly considered the legal arguments made by each side and the degree of cooperation they exhibited. We simply cannot say that the court made "a clear error of judgment in . . . weighing . . . the relevant factors." *Payne*, 121 F.3d at

507. The district court did not abuse its discretion when it denied the employees' motions for sanctions.

VIII

Under ADEA, Title VII, and their state breach of contract claim, Jeney, Gentile, and Coleman might be entitled to attorneys fees had they prevailed. *See* 29 U.S.C. §§ 216(b), 626; 42 U.S.C. § 2000e-5(k); Ariz. Rev. Stat. § 12-341.01. As we have affirmed the district court's grant of summary judgment, the employees have not prevailed and thus are not entitled to attorney's fees.[11]

IX

Because Jeney, Gentile and Coleman have failed to raise a question of material fact as to whether Quaker discriminated against them on the basis of age, race or sex, the district court's grant of summary judgment in favor of Quaker is

AFFIRMED.[12]

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[11]Thus, we do not reach the employees' argument that obtaining a reversal of summary judgment, the only relief they sought in this appeal, would have entitled them to such fees.

[12]Jeney's, Gentile's, and Coleman's state law claims for breach of contract and discharge in violation of public policy necessarily fail following summary judgment on the federal claims. Thus we need not reach the issue of whether Quaker's Code of Ethics modified the at will nature of the plaintiffs' employment.

B. FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent. The Quaker Oats Company ("Quaker") embarked on a major restructuring of its work force involving considerable downsizing. It sought consultation to prevent gender and racial discrimination in the process, but none to prevent age discrimination. Nobody denies that the statistics in this case show that the reduction in force terminations seriously impacted the older employees - much more so than the younger employees.[1] So regardless of intent, the *real* issue in this case is whether the process had a disparate impact on the older protected members of the work force.

The majority blinds itself to our own circuit precedent and to what all the parties knew this case was about in refusing to look at disparate impact. For this reason, I must dissent.

To reach its result - finding disparate impact not sufficiently or timely pled - the panel adopts a rule that is inconsistent with our own prior precedent regarding the Age Discrimination in Employment Act (ADEA). Yet, even under the erroneous rule the panel adopts, the plaintiffs in this case have stated a discrimination claim using the disparate impact

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[1]*See* majority opinion at 14932-33, providing examples of the findings and characterizing the statistical disparities as "striking"; *id.* at 14936, explaining that the plaintiffs' statistics demonstrated that employees over 40 received significantly lower rankings on average than those under 40.

theory and the district judge should be required to analyze whether the evidence is sufficient to go to trial on that theory.

In *Equal Employment Opportunity Commission v. Local 350, Plumbers and Pipefitters*, we held that plaintiffs may use the disparate impact theory to prove discrimination under the ADEA. *See EEOC v. Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n. 2 (9th Cir. 1993) (as amended on reconsideration). *Hazen Paper Co. v. Biggins*, decided while *EEOC v. Local 350* was pending, explicitly left that issue open. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). In *EEOC v. Local 350*, we further held that a plaintiff need not use the words "disparate impact" in order to state a claim in the complaint that is cognizable using such a theory.[2] *See EEOC v. Local 350*, 998 F.2d at 648 n. 2. Rather, we held that a complaint that identifies a company

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[2]This holding was foreshadowed by *Cotton v. City of Alameda*, 812 F.2d 1245, 1247 (9th Cir. 1987), where we allowed a liberal construction of an ADEA claim as both a disparate treatment and a disparate impact claim, and by *Palmer v. United States*, 794 F.2d 534, 538 (9th *Cir. 1986)*, where we allowed a claim that "did not specifically allege discrimination under the disparate impact theory" to go forward based on the notice provided by attachments to the complaint. In *Palmer*, the district court had determined that statistical studies attached to the complaint that strongly suggested a discriminatory impact constituted notice of an impact claim. *Id.*

Similarly, in the Title VII context, we have construed complaints that simply challenged discriminatory policies and practices without specifying the theory under which they were proceeding as disparate impact claims. *Golden v. Local 55 of the International Association of Firefighters*, 633 F.2d 817, 821 (9th Cir. 1980).

policy that falls more harshly on one group than another is "cognizable as a disparate impact challenge." *Id.* Examining the pleadings in that case, we said "[t]he EEOC does not specify in its pleadings or briefs on appeal whether it is proceeding under a disparate treatment or disparate impact theory of discrimination. Because in this circuit a plaintiff may challenge age discrimination under a disparate impact analysis, both theories were potentially available to the EEOC." *Id.*

In *Arnett v. California Public Employees Retirement System,* 179 F.3d 690, 697 (9th Cir. 1999), *vacated and remanded on other grounds*, (2000), we reaffirmed that plaintiffs may bring suit using a "disparate impact" theory under the ADEA.[3] We were asked whether an individual who challenges an employment policy whose consequences "fall more harshly" on those in the protected class states a claim of

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[3]We reaffirmed the *Arnett* holding in a recent opinion. In *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000), we explained that the *Arnett* opinion "squarely decided that a disparate impact claim is cognizable in an ADEA case." We affirmed that this holding was not rejected by the Supreme Court when it vacated *Arnett* in light of *Kimel v. Florida Bd. of Regents,* 528 U.S. 62 (2000). The *Kimel* Court held that ADEA does not abrogate the Eleventh Amendment. As we explained in *Frank*, "The Eleventh Amendment issue is irrelevant to a case, such as this one, in which a private rather than state entity is a defendant, and the Court's vacation of our decision has no bearing on the correctness of our conclusions that a disparate impact claim is cognizable under the ADEA. We see no reason to depart from our conclusion in *Arnett* and we again hold that a disparate impact claim is cognizable under the ADEA." *Frank,* 216 F.3d at 856.

disparate impact under the ADEA; we answered in the affirmative. *Id.* at 692. In *Arnett*, we reinstated a disparate impact claim after the district court granted a motion to dismiss the plaintiffs' complaint because we found plaintiffs' allegations sufficient to survive dismissal at the pleadings stage. *Id.* at 693. While plaintiffs had amended their complaint to state the impact claim explicitly, we focused on the adequacy of the pleading as a whole, not on the use of the words "disparate impact." *Id.*

Rather than confronting and relying on our own precedent, the majority turns to a third circuit case, *Josey v. Hollingsworth Corporation,* 996 F.2d 632 (3d Cir. 1993), which has facts very different from those in our case. In *Josey*, the Third Circuit held that the plaintiffs had not provided notice of their disparate impact claim when they raised it only after the close of discovery. *See id.* at 641-2. However, in that case the original complaint did not identify a specific employment practice that had a disparate impact. *See id.* at 642. Here, the plaintiffs' claims are grounded in a challenge to the termination policies of Quaker in the context of its downsizing; the claims were therefore always directed at the impact of a facially neutral policy. Furthermore, in this case, unlike in *Josey*, the plaintiffs did give notice, both in the wording of the complaint and by the discovery they conducted, including the resulting statistical evidence they put forward.

Even under the erroneous standard that the majority adopts, the plaintiffs in this case sufficiently stated a claim of disparate impact in their complaints. The in artful language in the complaints uses neither "disparate treatment" nor "disparate impact" to describe the allegations against Quaker.

Instead, they use the phrase "discrimination under the ADEA" to describe their claims. Since a plaintiff may prove discrimination using either theory, the complaint was sufficient to state both a disparate treatment and a disparate impact claim. Further, the complaint language that described Quaker's "practices," "policies" and "procedures" as discriminatory applies more aptly to *impact* than to treatment. No amendment of the complaint was required to allow the plaintiffs to prove their claim using a disparate impact approach. The district court considered the disparate treatment claims based on this generic language; it likewise should have considered the disparate impact claims.

Furthermore, the majority's argument that Quaker did not have notice of the disparate impact claims fails to recognize that all of the evidence of impact was in the company's hands and under its control. The discovery of the statistical evidence that suggests disparate impact was extensive and gave sufficient notice to Quaker of the disparate impact approach. This is especially true because statistics, while admissible to prove a disparate treatment claim, usually are unnecessary. Disparate impact claims, on the other hand, rely heavily and usually necessarily on statistics. In short, the extensive statistical discovery in this case surely placed Quaker on notice of plaintiffs' impact theory. Any claim to the contrary is disingenuous.

Even if we were to take a very narrow view and conclude that there was no notice to Quaker of the disparate impact claim until the summer of 1998 when that claim was fully briefed and plaintiffs moved for summary judgment on the claim, that was time enough. All of the relevant data was in Quaker's possession. Considerable time remained for

Quaker to prepare its defense. No trial date had yet been set. The judge took nine months to determine the outcome of the summary judgment motions.

The majority errs in adopting a standard that conflicts with our prior precedent. Even under the standard adopted by the majority, we should remand each of these cases to the district court to analyze whether the evidence is adequate to go to trial on the impact theory.

APPENDIX B

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed March 10, 1999]

No. CIV 95-1516 PHX RCB

JOSEPH GENTILE and)
LORRAINE GENTILE,)
Plaintiffs,)
)
v.)
)
THE QUAKER OATS COMPANY,)
Defendant.)
)

ORDER

Now pending before the court are plaintiff's Motion for Partial Summary Judgment, Defendant's Cross-Motion for Partial Summary Judgment, and Defendant's Motion for Summary Judgment (the first two motions focus on the disparate impact claim and latter deals with all other claims), and related motions, filed by both sides, to strike certain testimony and exhibits. The court heard oral argument on the partial summary judgment motions, as well as oral argument on six additional motions in two companion cases, on July 27, 1998. The court heard oral argument on the

Defendant's second summary judgment motion on November 2, 1998. All matters are currently under advisement. The court has now considered the arguments related to all motions, and it is prepared to rule. For the reasons that follow, the court will grant summary judgment on all claims, and dismiss the complaint.

BACKGROUND

Plaintiff began working for the Quaker Oats Company ("Quaker") in 1978 as an entry-level salesperson. He continued working with Quaker for approximately fifteen years, achieving the position of Customer Manager. In 1994 Plaintiff was eliminated as part of Quaker's nationwide re-engineering and reduction in force ("RIF"). This RIF eliminated almost all low level positions, and restructured the Quaker workforce.

Prior to 1993 Plaintiff was assigned to the Western Region of the Breakfast division. In mid-1993, however, he was re-assigned to the Customer Business Center ('CBC"), a pilot test center created within his division. Plaintiff worked in this capacity until the 1994 RIF that ended his employment with Quaker.

Throughout his employment with Quaker, Plaintiff received positive reviews regarding his 'people skills.' In fact, as late as 1992, Plaintiff won awards based on his salesmanship ability. However, his overall reviews worsened as his position began to require more analytical skill, a skill that several of Plaintiff's supervisors reported that he lacked. His reviews in 1993 contained comments regarding his failure to provide requested reports and to meet

deadlines. In his overall review in 1993, after his reassignment to the CBC, Plaintiff's supervisor gave him the lowest possible rating of "fails to meet expectations." While Plaintiff disputes the appropriateness of these reviews at this time, Plaintiff never attempted to follow the appropriate channels to alter these reviews. In addition, Quaker received an additional complaint about Plaintiff from an independent food broker.

In connection with the 1994 RIF, a team of individuals rated each employee in the Phoenix market, and the markets nationwide to, determine which individuals would be eliminated. Individuals were rated in groups determined by the closest fit to their current job.[1] Quaker looked at several factors including skills allegedly developed through headquarters ('HQ work"), including experience 'advanced fact-based selling," category expertise, and strategic business planning. Other non-HQ skills included customer operations understanding, leadership and communication. In addition, all employees were evaluated based on 'learning agility' and 'versatility.' Quaker's human resources department admittedly monitored the RIF process to insure that it did not have a negative effect on race or gender diversity within the company. However, Quaker claims no such effect was ever detected, and, therefore, no adverse action was necessary. Thus, the ranking allegedly proceeded according to the criteria above.

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[1]Quaker made an attempt to rank employees according to their level within the company. The level of an employee's job within Quaker is distinguished by hay points. An increase of 100 hay points equals a one level promotion. A Customer Manager position had about 438 hay points.

Quaker ranked individuals in groups, according to their position. Plaintiff held a Customer Manager job; thus, he was rated under the Customer Manager category. Plaintiff's poor evaluations, and concern surrounding his analytical ability, affected his performance in the ranking procedure. Therefore, within his group, Plaintiff did not receive one of the top scores. He received the overall grade of "B." Seven individuals ranked above Plaintiff: Bryan Hardman, Gary Dewalt, Stephen Carter, Stacy Ring, Quentin Burrell, Brian Edge, and Jake Coleman. As a result, he was not selected to fill one of the remaining sales jobs in Phoenix.

After Quaker completed its rankings, it had to select individuals to fill jobs within Arizona. Ken Willis made the selections. He made selections from Plaintiff's Customer Manager group, as well as from other higher-ranking groups. The first four positions that Willis filled were openings for Account Executives. These positions were fairly high level.[2] The next position was a Broker Field Manager "BFM" job, the highest ranking position.[3] The final job was a Customer Manager job. Willis selected Andrew Smith, Lisa Rodriquez, Steve Shields, and Jake Coleman as Account Executives. Smith, Shields, and Rodriquez had all received A or A- rankings within their group, and all had previously held positions at the same level. Coleman received a B+, and had years experience in HQ work. Willis selected Rod Brown to

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[2]Using the company's "hay point" structure, these jobs ranged from 636 to 732 hay points, about two to three levels above the Customer Manager category.

[3]This position had 732 hay points, and was about three levels above the Customer Manager category.

fill the Phoenix BFM position. Brown received a B+ ranking within his group, and had managed brokers prior to the re-engineering. Finally, Willis selected Bob Dumais for the Customer Manager position. Dumais had HQ experience and received a grade of B+. All six individuals are white, five were men, and at least three were forty or older. However, not all of the six chose to remain after the re-engineering.

After the decisions were announced in June, some employees rejected their positions, and some resigned prior to the effective date of the terminations pursuant to the RIF. Thus, new openings resulted. Smith elected to retire rather than accept his as an Account Executive. Don Rucker, Quaker's new director, filled Smith's vacancy with Glen Synoground. Synoground had received an A rating during the evaluation. However, Synoground resigned within one month, and Rucker was forced to once again look for a replacement. He selected Bryan Hardman, a Customer Manager from Los Angeles who had received an A rating during his evaluation. Finally, in November of 1994, Steve Shields resigned. His position was filled by Dumais. This decision created a vacant Customer Manager position. Rucker selected Ken Oliver.

Plaintiff was not selected for any position. Quaker claims that Plaintiff's shortfalls in the analytical area rendered him unqualified for the vacant positions. Plaintiff believes that he was terminated because of his age, race or gender. Plaintiff and several other employees filed an age discrimination charge with the Equal Employment Opportunity Committee ("EEOC"). The EEOC issued a for cause determination stating that there was reason to believe Plaintiff was terminated on the basis of age. Plaintiff also filed

a charge with the EEOC alleging race and sex discrimination. Although he was discharged on June 27, 1994, Plaintiff did not file the Title VII charge with the EEOC, alleging race and sex discrimination, until November 1, 1996.

DISCUSSION

I. Summary Judgment Standard.

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) . In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-48 (1986). A material factual is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. Id. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. See id. at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant

summary judgment. See. e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988).

II. Disparate Impact

Although Plaintiff secured a statistical expert rather early on in this case, the first direct surfacing of a disparate impact theory occurred when Plaintiff filed this motion for partial summary judgment. No claim clearly based on a disparate impact theory is present in Plaintiff's complaint; moreover, Plaintiff had not moved to amend the complaint prior to filing this motion. Therefore, as a threshold matter the court must determine whether this claim is properly before it. In addition, if the court finds that it is not, the court must determine whether Plaintiff should be allowed to amend his complaint at this late stage of the proceedings.

Plaintiff contends that the disparate impact claim flows naturally from the factual basis of the disparate treatment claim, and that the production relating to the statistical expert should have alerted the Defendant to the fact that such a claim would be raised. Plaintiff cites Gomes v. AVCO Corp., 964 F.2d 1330 (2nd Cir. 1992) in support of this proposition. As an alternative argument, Plaintiff asks that if the courts finds there is a need for such an amendment, it allow him to amend his complaint. Specifically, he cites Fed. R. Civ. P. 15(a), which liberally allows the amendment of complaints, and notes the lack of prejudice to the Defendant if such an amendment is allowed.

Defendant disagrees. First, Defendant notes that, according to the scheduling order in this case, the deadline to

amend the complaint expired nearly two years ago. Further, Defendant asserts that there would be sufficient prejudice in this matter because the addition of a disparate impact claim would have caused a change in strategy up to this point, including altering the focus of discovery from certain terminated individuals to the workforce as a whole. Finally, Defendant points out that, in light of the scheduling order, this amendment would fail under Rule 16(b) rather than 15(a).

There is little Ninth Circuit precedent relating to the issue of whether a disparate impact theory naturally flows from a disparate treatment theory. However, District Courts within this circuit have refused to recognize such a theory when not properly alleged. Cf. Klein v. Boeing Company, 847 F. Supp. 838, 844 (W.D. Wash. 1994) ("Klein never asserted this claim prior to his opposition to Boeing's motion for summary judgment, nor has he moved to amend his complaint. Thus, this claim is not properly before the court."). In addition, several well-reasoned opinions within other circuits suggest that a disparate impact claim must be properly pled. See Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 641-42 (3rd Cir.1993); AFSCME v. County of Nassau, 96 F.3d 644, 647 (2nd Cir. 1996) (recited in factual background that "because [plaintiff] never amended its complaint to adequately plead a disparate impact claim, the only claim . . . was intentional discrimination."); see also Dodaro v. Pennsylvania Turnpike Commission, 872 F. Supp. 188, 192-194 (M.D. Penn. 1995), aff'm 79 f.3d 1140 (3rd Cir. 1996); Ingram v. Per-Paid Legal Services. Inc.,--F. Supp.--, 1998 WL 251664, *11 n.4 (E.D. Okla. 1998). Because a complaint serves as a map for responsive pleadings and guides litigation, there is little reason to allow an additional theory, in the absence of an amendment, merely

because it stems from similar facts. Plaintiff's only cited authority does not suggest otherwise.

Gomes v. AVCO Corp. relates to a failure to include such a claim in the EEOC charge, prior to filing the lawsuit. The District Court determined that the claim was barred because Plaintiff failed to exhaust his administrative remedies. 964 F.2d at 1334-35. The Second Circuit concluded that because claim stemmed from the same factual basis, it should not be barred. Id. However, the Plaintiff in Gomes included the claim within his Third Amended Complaint. Id. at 1332. In the present instance, Plaintiff failed to include a disparate impact theory within complaint. Gomes does not address this situation, and provides little guidance to the court. Because the complaint serves an important role in the litigation process, the court will not simply overlook this failure and proceed as if Plaintiff had adequately plead such a theory. Accordingly, this court must only determine whether it should allow an amendment.

First, the court must consider whether this issue should be addressed under Rule 15(a) or 16(b). Because there is a scheduling order in this case governing the time for amendments, and because substantial time has passed since the court entered such order and since the amendment deadline expired, the court concludes that this matter is governed by 16(b). See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). Rule 16(b) changes liberal amendment policy provided by Rule 15(a).

> Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the

> prejudice to the opposing party, Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment. The district court may modify pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." . . . Although the existence of degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification.

Id. (citations omitted) (quoting Fed. R. Civ. P. 16(b)).Thus, before considering whether the amendment would be proper under Rule 15(a), the court must conduct an inquiry to determine whether Plaintiff has exercised diligence in this matter. Id.; see also Eckert Cold Storage v. Behl, 943 F. Supp. 1230, 1232-33 (E.D. Cal. 1996); Hannon v. Chater, 887 F. Supp. 1303, 1319 (N.D. Cal. 1995).

In the present case, Plaintiff secured his statistical expert over a year ago. Plaintiff has been in possession of the statistics in question for months. Plaintiff's failure to seek to amend his complaint is unexplained and somewhat surprising. Moreover, Plaintiff has repeatedly argued for rigid adherence to time limits established in this matter, even when Defendant missed particular deadlines by only days. This matter has been pending for close to three years, discovery has ended, and it has progressed to the dispositive motion stage. Simply put, this request comes very late in the proceedings without apparent good cause or diligence. Morever, regardless of the above factors, the court concludes that allowing an

amendment at this stage of the proceedings is simply unjust. Defendant has pursued discovery under a strategy, mainly geared toward a disparate treatment claim. Cf. Dodaro, 872 F. Supp. at 193 ("[I]t is more likely that the [Defendant] conducted its discovery believing that it faced only a disparate treatment claim."). To allow such claim at this point may require a reevaluation of this established strategy, in addition to reopening the matter for additional discovery, and Defendant may well be prejudiced.

In summary, an amendment at this late stage of the is too late. Such an amendment "would do nothing to expedite these proceedings, and would likely prejudice defendant. Plaintiff has provided no indication that he failed to amend his complaint for good cause or even excusable neglect. Accordingly, the disparate impact claim is not properly before this court. Plaintiff's motion must therefore be denied, and Defendant's motion granted.

III. Timeliness of the Race and Gender Discrimination Claim

Defendant asserts that Plaintiff failed to include a claim of race of gender discrimination in his EEOC complaint when it was originally filed. Rather, Plaintiff did not file such a charge until the required time to do so had passed. Plaintiff responds that the charge is timely because he lacked the factual basis to make such a claim prior to the time that he filed it.

Prior to filing a suit in a court of law, individuals believing that they have suffered an unlawful employment action must file a complaint with the EEOC. 29 U.S.C.

§ 2000e5 prescribes a time limitation for doing so. The statute requires individuals to file a charge of discrimination with the EEOC within 300 days of the alleged incident of discrimination. Id. However, like most statutes of limitations, the time limitation is "subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines Inc., 455 U.S. 385, 393-94 (1982).

In the present instance Quaker informed Plaintiff of its decision to terminate him on June 27, 1994. However, he did not file a Title VII charge with the EEOC until November 11, 1996, well after the 300 day limitation period. Plaintiff argues that the statute of limitations should be tolled because he did not discover facts to support his claim of race and gender discrimination until the fall of 1996, during formal discovery in this and related litigation. Defendant disagrees, and contends that Plaintiff's own statements during his deposition indicate that he suspected race and gender discrimination from the day that he was terminated. Thus Defendant protests that the statute of limitations expired 300 days after Plaintiff was terminated, which would be April 23, 1995.

In his deposition, Plaintiff communicates that he suspected race or gender discrimination at Quaker long prior to his decision to file the EEOC charge. A Quaker employee, Gloria Cowen, told Plaintiff in 1994 that she believed being a minority female helped her retain her job. Plaintiff indicated in his deposition that he probably thought the statement was true at the time she made it. (Plaintiff's Deposition, Day Three, at 46:16-23). Moreover, Plaintiff indicated that, prior to being terminated, he knew of at least one instance where he believed women received preferential treatment. Id. at 125:6-

25. Finally, at least one employee expressed similar concerns to Plaintiff, regarding preferential treatment. (Deposition of Jerry Jeney, at 309-311).

However, Plaintiff may not have had hard facts to back up his claims of discrimination. Plaintiff argues that a mere suspicion is not enough, and that is all he had prior to formal discovery in this case.

"The time period for filing a complaint of discrimination begins to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person "with a reasonably prudent regard for his rights." Boyd v. United States Post Office, 752 F.2d 410, 414 (9th Cir. 1985). If an aggrieved individual fails to exercise due diligence, equitable tolling will not apply. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990). Thus, the key question is whether a reasonably prudent person would have been put on notice of a potential discrimination charge, and whether Plaintiff exercised due diligence.

Plaintiff cites Hargett v. Valley Federal Savings Bank, 60 F.3d 754 (11th Cir. 1995) to support his case. In Hargett the plaintiff delayed his EEOC retaliation charge until a deposition revealed that he may have been retaliated against. The Hargett court determined that prior to the revelation in the deposition, the plaintiff did not have sufficient notice of a potential retaliation claim, because without the revelation, plaintiff could assume that any adverse action was merely tied to his age (he was pursuing an age discrimination claim.) Id. at 765. Prior events, including his failure to be rehired, simply did not provide plaintiff "with sufficient facts to place

a reasonable person on notice that retaliation had occurred." Id.

However, the present facts differ from the facts in at least one key aspect. Here, Plaintiff did, in fact, suspect race or gender discrimination. Other Quaker employees discussed their suspicions with him, and he agreed that discrimination was a factor. He was not oblivious to the possibility. His belief that supervisors took such consideration into account during his employment and during the RIF was enough to put him on notice. Thus, the doctrine of equitable tolling does not apply in this instance. Moreover, as demonstrated below, even if the court were to assume that the charge was timely, it fails regardless. See infra (IIIB).

IV. Disparate Treatment

Plaintiff argues that he was terminated as part of an overall plan to eliminate older, white males from Quaker's workforce. Thus, he argues that he was inappropriately terminated on the basis of age, gender and race. The prima facie case is similar under both Title VII and the ADEA.

To establish a prima facie case of discrimination under Tile VII and the ADEA, Plaintiff must demonstrate that: (1) he is a member of the protected class; (2) he was qualified for the position that he held; (3) he was discharged; and (4) he was replaced with an individual not in the protected class with equal or inferior qualifications. See McDonnell Douglas Corp v. Green, 411 U.S. 792, 802 (1973); Wallis v. J.R. Simplot, 26 F.3d 885, 888-891 (9th Cir. 1994). However, when a termination is the result of a reduction in force, a plaintiff does not necessarily need to demonstrate the fourth element.

Rather, Plaintiff may produce direct or circumstantial evidence to give rise to an inference of discrimination on the basis of the protected characteristic. Wallis, 26 F.3d at 891.

A. AGE

Plaintiff argues that Quaker terminated an overwhelming and disproportionate amount of older employees during the RIF. In addition, Plaintiff argues that he was more qualified than at least some of the individuals retained. Quaker disagrees, arguing that Plaintiff was not qualified for the remaining jobs due to lack of analytical ability, and, therefore, it terminated Plaintiff for nondiscriminatory reasons.

The court must first determine whether Plaintiff has established a prima facie case. First, Plaintiff is a member of the protected class. This fact is undisputed. Second, Plaintiff was discharged as part of a RIF. This fact is also undisputed. Therefore, the court will focus its inquiries on Plaintiff's qualifications, and his ability to show facts giving rise to an inference of discrimination.

Plaintiff contends that he was a highly regarded employee, and that he received several awards during his tenure with Quaker. Moreover, he asserts that complaints regarding his performance were the result of misunderstandings and mistakes on the part of his supervisors. He claims that he completed all of the requested work, and that his one poor review was unjustified.

Defendant on the other hand, claims that Plaintiff did not possess the analytical ability necessary in the new

positions, and that the poor reviews reflect this shortfall. However, in discharging Plaintiff, Defendant suggested that its decision was based on the RIF, not on Plaintiff's performance. This representation suggests that there is at least a question of fact that, in absence of the RIF, Plaintiff was qualified for the position that he held, and he was performing his job adequately.

Next, the court must determine whether Plaintiff was replaced by a member not in the protected class or whether there is an inference of discrimination. In the present case, three of the original six individuals were over forty. Therefore, Plaintiff does not easily meet the traditional test. However, Plaintiff lost his job pursuant to a RIF. Thus, he may present circumstantial and other evidence to raise an inference of causation.

Plaintiff attempts to meet this burden through statistical evidence. Plaintiff relies upon the testimony of Dr. Bardwell. Bardwell's results suggest that the likelihood of Quaker achieving purely random results resembling the same negative affect on older employees is about 1 in 3 billion. However, this result was based on a "chi square" analysis, which involved no additional variables. Once Dr. Bardwell considered other variables the results were not as impressive. In fact, when broken down for extensive peer analysis, his results were not even significant. Defendant challenges Bardwell's testimony and moved to strike it on this basis.

While the court will not strike the testimony, as it is somewhat probative in the context of this litigation, it is not as probative as Plaintiff would like to suggest. The value of statistics evidence at the prima facie stage depends in large

part on its reliability and its context. The failure to eliminate nondiscriminatory explanations for a disparity lowers the reliability and the value of the evidence. See Rose v. Wells Fargo, Co., 902 F.2d 1417, 1423 (9th Cir. 1990) (statistic evidence should eliminate other possible nondiscriminatory grounds for termination). In the present instance, Dr. Bardwell did not consider the market, did not consider the various jobs from which individuals were rated, did not consider the proliferation of older individuals in entry level positions (which were completely eliminated), the education of individuals, nor other factors that may have explained disparity in termination rates between different age groups. The failure to eliminate these other variables is telling, and the court is unable to make much of an inference of discrimination based on these statistics without other independent evidence of discrimination. See, e.g., Rea v. Martin Marietta Corp., 29 F. 3d 1450, 1456 (10th Cir.) (statistics evidence does little to support an inference of discrimination where it fails to eliminate possible nondiscriminatory explanations for the disparity); see also Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997) (arbitrary omissions and failure to inspect other variables render statistical evidence of little value and possibly inadmissible). Thus, it is unlikely that Dr. Bardwell's statistics alone are sufficient to support a prima facie case.

Moreover, the EEOC's finding of cause, in the absence of relevant facts, does not raise an inference of discrimination. This court is not bound by this determination, and in light of absence of sufficient factual support, this court will determine that Plaintiff has met his probable cause burden based on this determination alone. In any event, even if Plaintiff managed to raise a question of fact as to whether he

has met his probable case burden, he still cannot defeat Defendant's motion.

Once a Plaintiff establishes a prima facie case, the burden shifts to Defendant to offer a legitimate non-discriminatory reason for the decision. Defendant claims that its decision was nothing more than a decision to reduce and re-engineer its workforce to save money and to improve its operations. Defendant further argues that the decision to terminate Plaintiff was made pursuant to a non-discriminatory ranking system. Finally, Defendant asserts that the individuals selected for the remaining Phoenix positions were simply better qualified. The court agrees.

A reduction in force is a legitimate non-discriminatory reason for Defendant's decision to terminate Plaintiff. Rose, 902 F.2d at 1423. Thus, Plaintiff must offer evidence to show that this reason was a pretext for discrimination. Finally, the individuals selected for the remaining positions ranked higher in the company, ranked higher in the evaluation process, and had relevant experience to justify their selection.

First, Plaintiff looks again to the same statistical evidence used to support his prima facie case, and asserts that the great disparity demonstrated by such evidence shows evidence. As discussed above, where the statistics do not take into consideration possible nondiscriminatory reasons for the disparity, they are worthy of little weight. Bardwell failed to consider the specifics of Plaintiff's position in formulating the statistics. This failure is even more telling at the pretext stage, because statistics show little about the individual decisions made about Plaintiff. See Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458, 462 (9th Cir. 1987) ("[W]hile

statistics are often probative in determining the existence of a pattern or practice of disparate treatment, their usefulness in proving pretext 'depends primarily upon their relevance to the specific decisions affecting the individual plaintiff . . .'"). As discussed above, these statistics focused on the overall RIF, and, additionally, they failed to take into account the crucial variables involved. This fact is important, as the statistics did not account for the fact that Plaintiff received a poor evaluation, the fact that Plaintiff might not have possessed the appropriate analytical skills, or the fact that Plaintiff received a "B" rating. This failure to focus on Plaintiff's situation and failure to control for obvious variables affects the reliability of the statistics a great deal at the pretext stage. See rose, 902 F.2d at 1423; Hudson v. McDonnell Douglas Corp., 63 F.3d 771, 777-78 (8th Cir. 1995) (statistics that fail to control for obvious variables are not probative evidence of pretext). Thus, the statistics do little to show the motive of Defendant in terminating Plaintiff.

Plaintiff does not contest the fact that he received a review indicating that he was performing below expectations, or the fact that supervisors reported that they had not received requested reports. While he claims that the review and his supervisors were incorrect, as he always performed up to par, his contention does not negate the fact that these items were considered by Quaker when they rated his performance prior to the RIF. Neither Plaintiff's belief that he was judged improperly, nor the statistics of Dr. Bardwell alter this reality. The failure to consider this relevant information is damning. As such, the statistics are insufficient to raise an inference of pretext.

In addition, foreseeing the probability that Quaker would look to the subjective criteria and the rating system used during the RIF, Plaintiff retained two experts, Dr. Eisen and Dr. Blackwood to attack the nature of Quaker's criteria.[4] Essentially, the experts testimony, simplistically summarized, suggests that the criteria was poorly created, vague,

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[4]This expert testimony was the subject of a motion to strike. Defendant objects to the testimony because Plaintiff produced it outside of the normal course of discovery. That is, Plaintiff offered these witnesses after the court allowed additional time to produce rebuttal statistics experts, and Defendants contend that the experts exceed the scope of what the court allowed.

Plaintiff contends that the experts were offered to rebut the testimony of Defendant's statistical expert, Dr. Ward. Dr. Ward testified that the criteria used to evaluate Quaker employees was the single most important factor to determine whether age played any role in the decision making process, and whether such a determination had any statistical significance. Essentially, Ward testified that without considering additional factors, it would be impossible to evaluate the data properly.

Plaintiff argues that the expert testimony attempting to invalidate this criteria is essential to rebut Dr. Ward. However, Plaintiff misses the mark. Dr. Ward testified that the criteria would have to be considered in the context of statistical analysis. He did not testify about the quality of such criteria. Thus, it is not important that the criteria may not have been the most reliable evaluation of performance.

While the testimony might properly be excluded as untimely, as it is likely outside the scope of rebuttal, the court will consider it at this point in an effort to view Plaintiff's evidence in its most favorable light. In any event, the testimony does little to aid Plaintiff at this point in the proceedings. The motion to strike will be denied as moot.

subjective, and unreliable. In addition, the evidence suggests that objective tests could have been used by Quaker in place of its subjective formula. Even if the court were to accept this evidence without question, it does little more than criticize Quaker for making an unwise business move. The discrimination laws are not designed to punish such decisions. See Sharpe v. AT&T Corp., 66 F.3d 1045, 1050 (9th Cir. 1995) (court should not second guess business judgment). The court is unable to make the inferential leap that Plaintiff advocates and accept these facts as evidence of pretext. Plaintiff has not even suggested that Quaker experts purposefully rejected the objective tests. Nor is there evidence that Quaker decision makers knew that their process was faulty. Rather, at best, all that Plaintiff has established is that Quaker may have exercised poor judgment during the RIF. This fact does not suggest that the criteria was selected so that Quaker could discriminate, or that Quaker truly did not follow its own criteria but merely claimed to do so. In sum, evidence does not raise an inference that Quaker's true motivation was discrimination.

Finally, Plaintiff contends that the selection of unqualified people raises an inference of pretext. All Plaintiff offers to support this claim, however, is his subjective belief. Without further evidentiary support, these contentions offer little to support a showing of pretext. Quaker has adequately demonstrated why each individual was suited for the position Quaker selected them for. Quaker has also explained the shortfalls in Plaintiff's performance that lead to his "B" ranking. Mere accusations of discrimination cannot create an inference that these decisions were discriminatory. See Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1061 (9th Cir. 1989); Williams v. Williams Elecs., Inc., 856 F.2d 920, 924

(7th Cir. 1988). Even if they were unwise, as discussed above, this does not suggest pretext unless Plaintiff can offer sufficient evidence that the individuals are unqualified or lack the skills that Quaker contends they possess. Plaintiff's allegations fall far short of this mark.

Accordingly, Plaintiff cannot rebut Quaker's legitimate nondiscriminatory reason, and summary judgment is appropriate.

B. RACE AND GENDER

Although this claim is barred due to Plaintiff's failure timely exercise his administrative rights, the court will also look to the merits. The court concludes that summary judgment is appropriate, as Plaintiff cannot establish a prima facie case.

In regard to his race and gender claim Plaintiff must again look to circumstantial evidence of discriminatory intent to establish a prima facie case, because all but one of the employees retained were male and all were white, and because the question involves a RIF. Plaintiff is not armed with statistical data to show any disproportion. Rather, Plaintiff looks to Quaker's objectives within a project called Workforce 2001, and argues Quaker's intent to increase the diversity of its organization also shows its intent to reduce the population of white makes within its ranks. In addition, Plaintiff argues that this was an overall goal of the RIF, and that human resource employees monitored the RIF to insure that it did not have an impact on minorities, pursuant to Workforce 2001 objectives.

Quaker does not argue that it did not have an overall desire to increase diversity at the management level. Rather, it states that the overall goal of Workforce 2001 was formulated as a competitive strategy in response to data showing that management positions within Quaker were not diverse, and that women and minorities were facing the glass ceiling phenomenon within the company. Moreover, it agrees that it monitored the RIF to guarantee that it did not have a proportionally negative effect on women or minorities. However, it argues that the data from the unassisted rating process reflected no such negative effect, and, therefore, Quaker did not undertake any special effort to protect minorities and women.

Workforce 200I had the overall goal of increasing diversity at the management level. This effort was in response to the significant lack of such minority representation at high levels in Quaker. However, no evidence suggests that this goal was accomplished through illegal means. On the contrary, it appears that Quaker desired to eliminate any improper barrier to women and minorities. Plaintiff has not produced any evidence to show that Quaker intended to promote unqualified or less qualified women minorities at the expense of white males. Such a goal would in fact be improper. However, the goals of attracting a wider range of applicants and creating an even playing field for all individuals, which may necessarily result in fewer management jobs going to white males, are not improper. Plaintiff's objection to the result does not make the method or intent illegal, and no evidence exists to suggest otherwise. As such, Plaintiff is unable to state a prima facie case of race or gender discrimination, and summary judgment is proper on this claim as well.

Moreover, even if Plaintiff could establish a prima facie case of race or gender discrimination, he could not successfully rebut Quaker's legitimate non-discriminatory reason. As noted above, Quaker had the legitimate goal of reducing costs through a RIF, and the individuals retained were well qualified for the positions.

C. Arizona Public Policy

The Arizona Public Policy claim is premised on illegal discrimination. Having determined that no such discrimination existed in this case, summary judgment is appropriate to this claim as well.

V. The ERISA Claim

Plaintiff asserts that defendant violated § 510 of ERISA because it terminated him in an effort to avoid paying his pension benefits. Section 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140

Plaintiff bears the initial burden of establishing a prima facie case under this section. Plaintiff must provide evidence to raise the inference of: (1) prohibited employer conduct; (2)undertaken with the specific intent to interfere with the attainment of a protected right. See Dytrt v. Mountain Telephone & Telegraph Co., 921 F.2d 889, 895 (9th Cir. 1990). To meet his burden Plaintiff must show: (1) he had an opportunity obtain benefits under a covered plan; (2) he was qualified; and (3) his discharge gives rise to an inference of discrimination. See Dister v. Continental Group, 859 F.2d 1108, 1114 (2nd Cir.1998). If Plaintiff succeeds in establishing a prima facie case, the burden shifts to the Defendant to show a legitimate, nondiscriminatory reason for its actions. Ritter v. Hughes Aircraft Co., 58 F.3d 454, 457 (9th Cir. 1995).

First, there is no evidence, beyond mere cost savings, that Defendant acted with the intent to deprive Plaintiff of his pension benefits. Cost savings was the motivation for the RIF, as is usually the case. However, this simple fact does not equate to an intent to deny individuals their pension. Dytrt, 921 F.2d at 895. When the denial of a benefit is merely a consequence of an employer's actions, rather than the end goal, there is no violation of §510. Id. Moreover, as determined above, Quaker acted pursuant to legitimate business motivations.

VI. Breach of Contract

Plaintiff contends that a provision in Quaker's Code of Ethics modified his at-will employment relationship. Quaker contends that the language could not reasonably be interpreted to alter the at-will nature of employment, and that several

other documents received throughout Plaintiff's tenure at Quaker clearly stated that the nature of the relationship was at-will.

In Arizona there is a presumption that all employment relationships are at-will. Duncan v. St. Joseph's Hosp. & Medical Ctr., 903 P.2d 1007, 1111 (Ariz. Ct. App. 1995). A policy manual may become part of an employment contract or mitigate the at-will doctrine when an employee is provided the manual and may reasonably rely upon it. See Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1036 (Ariz. 1985). An employer can avoid these possible consequences by providing a clear disclaimer, so that an employee will not reasonably rely upon the representation. Duncan, 903 P.2d at 1114.

The Code of Ethics reads as follows:

> All employment-related decisions will be based on the business skills and qualifications of the individual. Race, creed, age, color, national original, ethnicity or other factors unrelated to skills or qualifications may never be a basis for favoritism or any other discriminatory behavior. No employee should be advantaged or disadvantaged by characteristics unrelated to the skills and qualifications of the work.

Quaker contends that this is merely repeating its preexisting legal obligation, and no employee could reasonably rely upon it as creating a "for cause" exception. The court agrees.

The language of the code of ethics is clearly an attempt to assure employees that Quaker intends to follow the Law. Such protection is nothing new; it is a protection already provided by federal and state law. As such, Quaker employees were already assured of such compliance through the applicable discrimination laws. However, it would be unreasonable for employees to assume that the code stood for even more. The language clearly portrays Quaker's intent to act with integrity; however, it is not probative on whether employees could be terminated for cause.

Moreover, Quaker stressed the at-will nature of employment through other manuals and handouts. It regularly reiterated the nature of the employment relationships between the Company and its employees. Because of this reinforcement, employees had no reason to believe that their employee was anything but at-will. However, even if this were not true, Quaker acted pursuant to a reduction in force, a clearly work related reason, and judged its employees based on their qualifications. This action easily fell within language of the Code of Ethics. As such, summary judgment is warranted on this claim as well.

VII. Conclusion

The court has reviewed Defendant's Motion for Summary Judgment and determined that, as to all counts, it is well-taken. Plaintiff's claims of discrimination, public policy, breach of contract, and ERISA are unsupported. Thus, the court will grant summary Judgment and dismiss the case.

IT IS ORDERED granting Quaker's Motion for Summary Judgment (doc 212). The clerk is ordered to enter judgment and terminate this case.

IT IS FURTHER ORDERED denying, as moot, Quaker's Motion to Exclude Plaintiff's Experts Dr. Eisen and Dr. Blackwood (doc. 185).

IT IS FURTHER ORDERED denying, Plaintiff's Motion for Partial Summary Judgment (doc. 191).

IT IS FURTHER ORDERED denying, Defendant's Motion to strike Dr. Bardwell's testimony (doc. 195).

IT IS FURTHER ORDERED granting, Defendant's Motion for Summary Judgment on the Disparate Impact Claim (doc. 196).

IT IS FURTHER ORDERED denying, as moot, Plaintiff's Motion to Strike (doc. 205).

DATED this _____ day of March, 1999.

/s/_____
Robert C. Broomfield
United States District Judge

Copies to counsel of record

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed March 10, 1999]

No. CIV-95-1516-PHX-RCB

JOSEPH GENTILE and LORRAINE GENTILE,
Plaintiffs,

v.

THE QUAKER OATS COMPANY,
Defendant.

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury had rendered its verdict.

XX Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's Motions for Summary Judgment having been granted, that

plaintiffs take nothing and the complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 10th day of March, 1999.

RICHARD W. WEARN
Clerk of Court/DCE

/s/_____
By:
Deputy Clerk

APPENDIX D

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed March 10, 1999]

No. CIV 96-0828 PHX RCB

PERRY COLEMAN; et ux.;
Plaintiffs,

vs.

THE QUAKER OATS COMPANY,
Defendant.

ORDER

Now pending before the court are Defendant's two Summary Judgment Motions, Plaintiff's Motion for Partial Summary Judgment, and related motions, filed by both sides, to strike certain testimony and exhibits. The court heard oral argument on the pending motions, as well as oral argument on additional pending motions in two companion cases, on July 27, 1998. Following oral argument, the court took all matters under advisement but elected to await full briefing and argument on an additional motion in one of the companion cases. Having carefully considered the issues raised and the parties' arguments, the court now rules.

BACKGROUND

Plaintiff began working for Quaker Oats Company ("Quaker") in March 1972, as an Account Representative. He worked with Quaker for 23 years. In June of 1995 Quaker notified Plaintiff that he was being terminated pursuant to a reduction in force ("RIF"). At the time, he held the position of Account Executive, and was earning an annual salary of $50,292.00. By all accounts, he was an impressive employee. However, the sale of a division of Quaker lead to the need to reduce its ranks. Thus, for the third consecutive year, Quaker was forced to engage in a RIF.

The 1995 RIF, though significant, was smaller than the previous year's RIF. In fact, the RIF the prior year had resulted in the termination of 300 employees. And, while the 1995 RIF was entirely a cost-cutting measure, the 1994 RIF was a re-engineering effort that changed the entire structure of Quaker.

In connection with the 1994 RIF, a team of individuals rated each employee in the Phoenix market, and the markets nationwide, to determine which individuals would be eliminated. Individuals were rated in groups determined by the closest fit to their current job. Quaker looked at several factors including skills allegedly developed through headquarters ("HQ work"), including experience in "advanced fact-based selling," category expertise, and strategic business planning. Other skills evaluated, considered non-HQ skills, included customer operations understanding, leadership and communication. In addition, all employees were evaluated based on "learning agility" and "versatility."

Three of the factors involved HQ skills. According to Defendant, HQ work includes analyzing data, developing sales strategies, and marketing those strategies to executives. Those individuals in higher ranking jobs had more access to these skills. Therefore, Quaker asserts that ranking individuals in groups assured that lower ranking employees were held to a lesser standard. Thus, individuals that held low level jobs were not held to the same standard as individuals within the highest ranking positions at Quaker.

The level of an employee's job within Quaker is distinguished by hay points. An increase of 100 hay points equals a one level promotion. Plaintiff held a position of Customer Manager within Quaker, with 438 hay points. Thus, Plaintiff was rated under the Customer Manager category. Within this category, Plaintiff scored relatively well. He received the overall grade of "B+." Other individuals rated within this category included Bryan Hardman, Gary Dewalt, Stephen Carter, Stacy Ring, Quentin Burrell, and Brian Edge. Plaintiff was selected to fill one of the remaining six sales jobs in Phoenix.

Ken Willis made the selections. He selected individuals from Plaintiff's Customer Manager group, as well as from other higher-ranking groups. The highest ranking job Willis had to fill was the Broker Field Manager ("BFM") job, a high ranking position with 732 hay points. Defendant contends that Plaintiff was not qualified for this position, and Plaintiff does not argue otherwise. The next four jobs were Account Executives. These positions were fairly high level, at 636 or 732 hay points. Three of the Account Executive positions were considered more advanced than the fourth, as they dealt with more important customer accounts. Willis

selected Andrew Smith, Lisa Rodriguez, Steve Shields for these positions. All three had "A" ratings. The fourth Account Executive position was not on the same level as the other three, because of different accounts, but was nonetheless important. Plaintiff received this fourth Account Executive position. The final job was a Customer Manager Job, with 438 hay points. Willis selected Bob Dumais for the Customer Manager. Dumais had HQ experience and received a grade of B+. Of the applicants selected for the six jobs, at least three were forty or older. However, not all of the six individuals selected chose to remain with Quaker.

After these decisions were announced in June of 1994, some employees rejected their positions, and some resigned prior to the effective date of the terminations pursuant to the RIF. Thus, new openings resulted. Smith elected to retire rather than accept his position as an Account Executive. Don Rucker, Quaker's new director, filled Smith's vacancy with Glen Synoground. Synoground had received an A rating during the evaluation. However, Synoground resigned within one month, and Rucker was forced to once again look for a replacement. He selected Bryan Hardman, a Customer Manager from Los Angeles who had received an A rating during his evaluation. Finally, in November of 1994, Steve Shields resigned. His position was filled by Dumais. This decision created a vacant Customer Manager position. Rucker selected Ken Oliver.

These individuals remained in their relative positions until 1995 when Quaker sold its pet food division. This sale forced another RIF. At this time Quaker reviewed its Phoenix division and determined that two sales positions had to be eliminated. This decision lead to another ranking process.

This time, the Account Executives and the one Customer Manager were evaluated by their supervisors. Five individuals were rated: Lisa Rodriguez, Bryan Hardman, Plaintiff, Bob Dumais, and Ken Oliver. Two supervisors were responsible for the evaluations, Julie Forbes and Bob Blair. After the numerical ranking were complete, Plaintiff ranked third of the five individuals rated. Rodriguez received the highest rating, of 16, and Hardman received the second highest, of 14. Plaintiff received a 13, Bob Dumais received a 12, and Ken Oliver received an 11. Oliver and Dumais were selected for termination.

After realizing that Dumais was selected for termination, Julie Forbes, his immediate supervisor objected. She noted that the one point difference between Dumais and Plaintiff was likely due to the fact that she rated Dumais, and Blair rated Plaintiff. Forbes claimed that she was a tougher grader. Her reputation within the company supported this claim. Thus, due to her strenuous objections, Rucker instructed Forbes and Blair to re-rate Plaintiff and Dumais in a head-to-head rating process.

Quaker alleges that Forbes prepared well for the reevaluation. She gathered documents in support of Dumais, and was not prepared to back down. Ultimately, Blair claims he simply gave up. Accordingly, Forbes prevailed and Dumais kept his job. Unfortunately for Plaintiff, this left him in the position to be terminated. Both Plaintiff and Oliver were selected for termination.

After Rucker made his decision, he discussed the situation with Quaker's Vice President, Terry Mohr. Mohr asked whether Rucker had any reservations about the RIF.

Rucker indicated that he would have preferred to retain one additional salesperson to call on the Basha's account and to work with the current broker. Mohr relented to this request; however, he did so on the condition that there would be no increase in net costs. Pursuant to this restriction, Rucker selected Oliver.

Rucker allegedly found that this was an easy choice over Plaintiff because the position was two levels below Plaintiff, and Oliver was already working the account. In fact, the broker recommended Oliver. Accordingly, Oliver retained his job and only Plaintiff was terminated.

After Plaintiff learned of the termination decision he filed a charge with the EEOC on May 8, 1995. The EEOC later issued a for cause determination on his behalf.

DISCUSSION

I. Motions to Strike

A. PLAINTIFFS' OBJECTIONS TO DEFENSE EXHIBITS

First, Plaintiffs filed objections and a motion to strike in connection with the pending summary judgment motions. To a large extent, any defect in the proposed exhibits has been cured by a subsequent submission of authenticating affidavits by Defendant. The remaining objection surrounds a discovery issue. Essentially, Plaintiff contends that he was not supplied with various employment applications submitted by Defendant in conjunction with its motions. However, Defendant responds that it did provide Plaintiff with such

applications, but Plaintiff chose not to copy the applications in an effort to save money.

Defendant indicated its intention to rely on such documents in its late response (the subject of a previous motion to strike) to Plaintiff's interrogatory questions. Plaintiff knew of this intent, and objected that the response was burdensome; however, Plaintiff never indicated any difficulty obtaining the records. Thus, it must be assumed that Plaintiff had the opportunity to view the documents and copy them if desired. Regardless, the documents are not highly prejudicial. The court will deny this motion to strike.

B. DEFENDANT'S MOTION TO STRIKE DR. BARDWELL

The court will now direct its attention to a much more substantive motion to strike. Plaintiff intends to rely upon the testimony of Dr. Bardwell, a statistical expert, to show both disparate treatment and a disparate impact. Defendant has moved to strike this testimony. Bardwell's results suggest that the likelihood of Quaker achieving purely random results resembling the same negative affect on older employees is about 1 in 3 billion. However, this result was based on a "chi square" analysis, which involved no additional variables. Once Dr. Bardwell considered other variables the results were not as impressive. In fact, when broken down for extensive peer analysis, his results were not even significant. See Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977)(significance requires at least two standard deviations). He performed eight tests total, and every test produced a different result. The results varied wildly. Defendant contends

that this fact shows that the evidence is not reliable and should be excluded.

Plaintiff argues that the lesser results merely demonstrate that the rating criteria used was discriminatory. He insists that the more accurate result is the chi square test. Moreover, he insists that even the less significant results suggests discrimination. His expert disagrees that the results are not significant, arguing that the Supreme Court test (requiring two to three times an expected result to indicate a significant departure from that result) is too stringent, and that a better measure is somewhat less demanding, 1.65 standard deviations.

The court is stunned with Plaintiff's dismissal of Supreme Court precedent. When the Supreme Court says something is not significant, this court is bound to follow their analysis. Thus, the less dramatic results, the result of adding additional criteria, are not significant. This fact indicates the overall flaw in Bardwell's data.

The failure to eliminate non-discriminatory explanations for a disparity lowers the reliability and the value of the evidence. See Rose v. Wells Fargo, Co., 902 F.2d 1417, 1423 (9th Cir. 1990) {statistics evidence should eliminate other possible nondiscriminatory grounds for termination). In the present instance, Dr. Bardwell did not consider the market, did not consider the various jobs from which individuals were rated, did not consider the proliferation of older individuals in entry level position (which were completely eliminated), the education of individuals, nor other factors that may have explained different variances. The failure to eliminate these other variables is telling, and the

court is unable to make much of an inference of discrimination based on these statistics without other independent evidence of discrimination. See, e.g., Rea v. Martin Marietta Corp., 29 F.3d 1450, 1456 (10th Cir.) (statistics evidence does little to support an inference of discrimination where it fails to eliminate possible nondiscriminatory explanations for the disparity); see also Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997)(arbitrary omissions and failure to inspect other variable render statistical evidence of little value and possibly inadmissible).

However, while the court believes that the statistics are of little value without considering nondiscriminatory variables, the court also believes that they do little to aid Coleman, or the plaintiffs in the related cases, Gentile and Jeney. Therefore, there is little harm in admitting the statistics into evidence in the two related cases. Moreover, many of the problems discussed above affect the weight of the evidence, rather than its admissibility. Defendant will have ample opportunity to challenge the results on cross-examination. However, additional reasons warrant excluding the statistics expert from this case.

In analyzing the Quaker terminations, most of Bardwell's statistics only address the 1994 reduction in force. Coleman was terminated pursuant to the 1995 reduction in force. Bardwell only performed a chi-squared analysis on the 1995 data. This analysis considered absolutely no additional factors. Furthermore, it did not even focus on the reduction in force itself, but rather on any and all terminations subsequent to the 1994 reduction in force. This analysis is

simply insufficient, and the court will preclude Bardwell's testimony in this, the Coleman case.

II. Summary Judgment Standard

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. Id. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a genuine issue for trial. See id. at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988).

III. Disparate Impact

Although Plaintiff secured a statistical expert rather early on in this case, the first blatant surfacing of a disparate impact theory occurred when Plaintiff filed this motion for partial summary judgment. No claim, clearly based on a disparate impact theory, is present in Plaintiff's complaint; moreover, Plaintiff had not moved to amend the complaint prior to filing this motion. Therefore, as a threshold matter the court must determine whether this claim is properly before it. In addition, if the court finds that it is not, the court must determine whether Plaintiff should be allowed to amend his complaint at this late stage of the proceedings.

Plaintiff contends that the disparate impact claim flows naturally from the factual basis of the disparate treatment claim, and that the production relating to the statistical expert should have alerted the Defendant to the fact that such a claim would be raised. Plaintiff cites Gomes v. AVCO Corp., 964 F.2d 1330 (2nd Cir. 1992) in support of this proposition. As an alternative theory, Plaintiff asks, if it finds there is a need for such an amendment, that the court allow him to amend his complaint. Specifically, he cites Fed. R. Civ. P. 15(a), which liberally allows the amendment of complaints, and notes the lack of prejudice to the Defendant if such an amendment is allowed.

Defendant disagrees. First, Defendant notes that, according to the scheduling order in this case, the deadline to amend the complaint expired nearly two years ago. Further, Defendant asserts that there would be sufficient prejudice in this matter because the addition of a disparate impact claim would have caused a change in strategy up to this point,

including altering the focus of discovery from certain terminated individuals to the workforce as a whole. Finally, Defendant points out that, in light of the scheduling order, this amendment would fall under Rule 16(b) rather than 15(a).

There is little Ninth Circuit precedent relating to the issue of whether a disparate impact theory naturally flows from a similar disparate treatment theory. However, District Courts within this circuit have refused to recognize such a theory when not properly alleged. Cf. Klein v. Boeing Company, 847 F. Supp. 838, 844 (W.D. Wash. 1994) ("Klein never asserted this claim prior to his opposition to Boeing's motion for summary judgment, nor has he moved to amend his complaint. Thus, this claim is not properly before the court."). In addition, several well-reasoned opinions within other circuits suggest that a disparate impact claim must be properly pled. See Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 641-42 (3rd Cir. 1993); AFSCME v. County of Nassau, 96 F.3d 644, 647 (2d Cir. 1996)(recited in factual background that "because [plaintiff] never amended its complaint to adequately plead a disparate impact claim, the only claim . . . was intentional discrimination."); see also Dodaro v. Pennsylvania Turnpike Commission, 872 F. Supp. 188, 192-194 (M.D. Penn. 1995); Ingram v. Per-Paid Legal Services, Inc., --F. Supp.--, 1998 WL 251664, *11 n.4 (E.D. Okla. 1998). Because a complaint serves as a map for responsive pleadings and guides the litigation, there is little reason to allow an additional theory, in the absence of an amendment, merely because it stems from similar facts. Plaintiff's only cited authority does not suggest otherwise.

Gomes v. AVCO Corp. relates to a failure to include such a claim in the EEOC charge, prior to filing the lawsuit.

The District Court determined that the claim was barred because the Plaintiff failed to exhaust his administrative remedies. Gomes, 964 F.2d at 1334-35. The Second Circuit concluded that because the claim stemmed from the same factual basis as the disparate treatment claim included in the EEOC charge, it should not be barred. Id. However, the plaintiff in Gomes included the disparate impact claim within his Third Amended Complaint. Id. at 1332. Conversely, in the present instance, Plaintiff failed to include a disparate impact theory within his complaint. Gomes does not address this situation, and provides little guidance to the court. Because the complaint serves an important role in the litigation process, the court will not simply overlook this failure and proceed as if Plaintiff had adequately plead such a theory. Accordingly, this court must determine whether it should allow an amendment.

First, the court must consider whether this issue should be addressed under Rule 15(a) or 16(b). Because there is a scheduling order in this case governing the time for amendments, and because substantial time has passed since the court entered such order, and since the amendment deadline expired, the court concludes that this matter is governed by 16(b). See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). Rule 16(b) changes the liberal amendment policy provided by Rule 15(a).

> Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment.

> The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." . . . Although the existence of [some] degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification.

Id. (citations omitted) (quoting Fed. R. Civ. P. 16(b)) . Thus, before considering whether the amendment would be proper under Rule 15(a), the court must conduct an inquiry to determine whether Plaintiff has exercised diligence in this matter. Id.; see also Eckert Cold Storage v. Behl, 943 F. Supp. 1232-33 (E.D. Cal. 1996); Harmon v. Chater, 887 F. Supp. 1303, 1319 (N.D. Cal. 1995).

In the present case, Plaintiff secured his statistical expert over a year ago. Plaintiff has been in possession of the statistics in question for months. Plaintiff's failure to amend his complaint is surprising. Moreover, Plaintiff has repeatedly argued for rigid adherence to guidelines in this matter, even when Defendant missed particular deadlines by only days. This matter has been pending for over two years, and has progressed to the dispositive motion stage. Simply put, this request comes quite late in the proceedings without apparent good cause or diligence. Morever, regardless of the above factors, the court concludes that allowing an amendment at this stage of the proceedings is simply unjust. Defendant has likely pursued discovery under a strategy geared toward a disparate treatment claim. Cf. Dodaro, 872 F. Supp. at 193 ("[I]t is more likely that the [Defendant] conducted its

discovery believing that it faced only a disparate treatment claim."). To allow such claim at this point may require a reevaluation of this established strategy, in addition to additional discovery, and Defendant may well be prejudiced.[1]

In summary, an amendment during this course of the litigation is undesirable. Such an amendment would do nothing to expedite these proceedings, and would likely prejudice defendant. Plaintiff has provided no indication that he failed to amend his complaint for good cause or even excusable neglect. Accordingly, the disparate impact claim is not properly before this court. Plaintiff's motion must therefore be denied, and Defendant's motion granted.

IV. Disparate Treatment

Plaintiff argues that he was terminated as part of an overall plan to eliminate older, white males from Quaker's workforce. Thus, he argues that he was inappropriately terminated on the basis of age, gender and race. The prima facie case is similar under both Title VII and the ADEA.

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[1]In any event, there are also serious problems with Plaintiff's statistical expert in this case. The expert was retained for use in this and two companion cases. Plaintiffs in the two companion cases were terminated during the 1994 RIF. Accordingly, the expert mainly analyzed data from the 1994 RIF. The fact that this expert did not engage in any meaningful analysis of the 1995 RIF is a serious concern in relation to this litigation. Therefore, because the court intends to strike the expert in relation to this case, Plaintiff's disparate impact case is without a doubt meritless.

To establish a prima facie case of discrimination under Title the ADEA, Plaintiff must demonstrate that: (1) he is a member of the protected class; (2) he was qualified for the position that he held; (3) he was discharged; and (4) that he was replaced with an individual substantially younger than him with equal or inferior qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Wallis v. J.R. Simplot, 26 F.3d 885, 888-891 (9th Cir. 1994). However, when a termination is the result of a reduction ±n force, a plaintiff does not necessarily need to demonstrate that he was replaced with a member not in the protected class. Rather, Plaintiff may produce direct or circumstantial evidence to give rise to an inference of discrimination on the basis of age. Wallis, F.3d at 888-91.

A. PRIMA FACIE CASE

Plaintiff argues that Quaker terminated an overwhelming and disproportionate amount of older employees during the RIF. In addition, Plaintiff argues that, by virtue of his experience with Quaker, he was more qualified than the individuals retained, particularly Dumais. Quaker disagrees, and argues that it terminated Plaintiff for nondiscriminatory reasons.

The court must first determine if Plaintiff can establish a prima facie case. Defendant quarrels with Plaintiff's ability to show any evidence from which a reasonable trier of fact could infer discrimination.

Plaintiff points to statistics, which the court has previously determined are not probative in this case. In addition, Plaintiff looks to the EEOC determination.

However, the EEOC determination does not discuss the specifics of Plaintiff's case, the reasoning that led to the determination, or what factors were considered. Therefore, the court must conduct its own analysis. Thus while it is slightly probative, the determination is insufficient to carry Plaintiff's prima facie case.

Plaintiff also looks in large part to the people retained, and claims that he was more qualified. He rests his argument in large part on the fact that he had more seniority than the candidates retained. He begins with Lisa Rodriguez, and notes that she was both younger and a woman, and her only account was PetSmart.[2] Next, Plaintiff looks to Hardman, Dumais, and Oliver. In connection with all three Plaintiff claims he was more experienced because he had worked with Quaker longer. He criticizes the fact that Hardman was transferred from Los Angeles, while Quaker could have provided the position to Plaintiff, who was local. As for Dumais, he argues that he was set to be terminated prior to the 1994 RIF, that he

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[2]The court notes that the reference to Rodriguez' gender at this point was likely a mistake on Plaintiff's part. No inference can be drawn that Rodriguez was less qualified merely because she was a woman, and the court takes for granted that Plaintiff did not intend to suggest otherwise. Rather, the court assumes Plaintiff's attorneys neglected to delete this reference from the related litigation, Jeney v. Quaker Oats, in which the Plaintiff Jeney is also pursuing a race and gender claim. To the extent that the court assumes incorrectly, it is axiomatic that an individual's gender is not probative as to whether they are qualified, or more qualified than another, for a particular position.

lacked computer skills, and that Blair had criticized Dumais. Plaintiff claims that Oliver simply lacked experience.

Plaintiff even looks outside the Phoenix market and criticizes two other retained employees, named Burrell and Wassom. Plaintiff argues that Burrell's supervisor was terminated, yet Burrell was retained. Plaintiff argues he was more qualified than Wassom. Again, he points out that both were younger and had less experience with Quaker.

Quaker disagrees with Plaintiff's characterizations. It insists that it picked the most qualified individuals for the positions. Moreover, no candidate was transferred in 1995. The court agrees that there is little evidence from which it can infer discrimination.

Rodriguez held a position almost three levels above Plaintiff prior to the 1994 RIF. She had significant HQ experience, and performed impressive work with her main account PetSmart. This account was allegedly not her only account, but rather, her most significant, and the one that earned her a reputation as an impressive performer in the area of advanced fact-based selling.

Hardman was also re-ranked during 1995, and scored the second highest score. In addition, he scored well under different criteria in the 1994 RIF. Nothing supports Plaintiff's contention that he was not qualified.

As for Burrell and Wassom, both were located in another market. Quaker did not consider transferring anyone outside of their market during the 1995 RIF. Thus, the decision not to transfer Plaintiff was the result of a company-

wide decision, rather than some other evil motive. Moreover, Plaintiff offers nothing reliable to suggest that either individual was not qualified. A mere allegation is not enough to even raise an inference of discrimination. Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1061 (9th Cir. 1989) (citing Angel v. Seattle-First Nat'l Bank, 653 F.2d 1293, 1299 (9th Cir 1981)); Williams v. Williams Electronics, Inc., 856 F.2d 920, 924 (7th Cir. 1988).

However, as to the decision involving Dumais and Oliver, both originally ranked below Plaintiff in the 1995 RIF. Both are younger than Plaintiff. Although there is little other evidence to show discrimination, the court will assume that this is sufficient to state a prima facie case.

B. LEGITIMATE NONDISCRIMINATORY REASON AND PRETEXT

Once a Plaintiff establishes a prima facie case, the burden shifts to Defendant to offer a legitimate non-discriminatory reason for the decision. Defendant claims that its decision was nothing more than a decision to reduce costs. Defendant further argues that the decision to terminate Plaintiff was made pursuant to a non-discriminatory ranking system, and Julie Forbes insistence that Dumais be retained.

A reduction in force is a legitimate non-discriminatory reason for Defendant's decision to terminate Plaintiff. See Rose v. Wells Fargo, co., 902 F.2d 1417, 1423 (9th Cir. 1990). The decision was made pursuant to a ranking system, and pursuant to Forbes insistence that she had worked closely with Dumais and that he should be retained. The preference for one employee over another, so long as it is not based on

an illegal motive, is not discriminatory. Cf. Shutt v. Sandoz Crop Protection Corp., 944 F.2d 1431, 1433 (9th Cir. 1991) (disparate impact case where disproportionate terminations fell upon newly merged-in employees). In this case, Forbes preferred Dumais because he worked for her, and because she had a strong belief in his ability. Plaintiff acknowledges that Forbes simply did not know him. These circumstances demonstrate that Defendant had a legitimate business reason for its actions. Thus, Plaintiff must offer evidence to show that this reason was a pretext for discrimination.

First, Plaintiff attempts to discredit the ranking system. Plaintiff retained two experts, Dr. Eisen and Dr. Blackwood, to attack the nature of Quaker's criteria.[3]

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[3]This expert testimony was the subject of a motion to strike. Defendant objects to the testimony because Plaintiff produced it outside the normal course of discovery. That is, Plaintiff offered these witnesses after the court allowed additional time to produce rebuttal statistics experts, and Defendants contend that the experts exceed the scope of what the court allowed.

Plaintiff contends that the experts were offered to rebut the testimony of Defendant's statistical expert, Dr. Ward. Dr. Ward testified that the criteria used to evaluate Quaker employees was the single most important factor to determine whether age played any role in the decision making, and whether such a determination had any statistical significance. Essentially, Ward testified that without considering additional factors, it would be impossible to evaluate the data properly.

Plaintiff argues that the expert testimony attempting to invalidate this criteria is essential to rebut Dr. Ward. However, Plaintiff misses the mark. Dr. Ward testified that the criteria would have to be considered in the context of statistical analysis. He did not testify about the quality of such criteria. Thus, it is not

Essentially, the experts testimony, simplistically summarized, suggests that the criteria was poorly created, vague, subjective, and unreliable. In addition, the evidence suggests that objective tests could have been used by Quaker in place of its subjective formula. Even if the court were to accept this evidence without question, it does little more than criticize Quaker for making an unwise business move. The discrimination laws are not designed to punish such decisions. See Gustovich v. AT& T Communications, 972 F.2d 845, 848, 851 (7th Cir. 1992) (per curiam). The court is unable to make the inferential leap that Plaintiff advocates and accept these facts as evidence of pretext. Plaintiff has not even suggested that Quaker experts purposefully rejected the objective tests. Nor is there evidence that Quaker decision makers knew that their process was faulty. Moreover, Eisen and Blackwood look to criteria used during the 1994 RIF. Quaker used different criteria in 1995. This fact further precludes any inference of pretext. At best, all that Plaintiff has established is that Quaker may have exercised poor judgment during the 1994 RIF. This possibility does not help Plaintiff. See Sharpe v. AT&T, 66 F.3d 1045, 1050 (9th Cir. 1995). This fact does not suggest that the criteria was selected so that Quaker could discriminate, or that Quaker truly did

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important that the criteria may not have been the most reliable evaluation of performance.

While the testimony would properly be excluded as untimely, the court will consider it at this point in an effort to view Plaintiff's evidence in its most favorable light. In any event, the testimony of Dr. Eisen and Dr. Blackwood does little to aid Plaintiff at this point in the proceedings. The motion to strike will be denied as moot.

not follow its own criteria but merely claimed to do so. In sum, this evidence does not raise an inference that Quaker's true motivation was discrimination.

Next, Plaintiff again attacks the candidates as unqualified. As already discussed, the candidates selected, other than Dumais and Oliver, either ranked above Plaintiff or were not located in the Phoenix market. Thus, little can be inferred from these individuals, especially on the issue of pretext.

As for Dumais and Oliver, nothing suggests that either was unqualified. Although both originally ranked slightly lower than Plaintiff, Quaker has offered a sufficient explanation. Forbes preferred Dumais, and fought for his retention. Oliver suited the Customer Manager position better than Plaintiff. Plaintiff has offered no additional evidence of pretext to rebut this explanation.

Plaintiff attacks the fact that Forbes preferred the younger candidate, without explanation. However, Forbes own affidavit provides an explanation. She worked with Dumais, and he had come through for her under her self-confessed tyrannic reign. She was fiercely loyal to those employees under her. Accordingly, she fought for his job, believing that he was the better candidate. This show of preference is insufficient to raise an inference of pretext,

Finally, Plaintiff points to evidence of additional benefits Quaker offered in exchange for his signature of a release of claim. This offer of benefits, however, offers little. The offer was made on May 12, 1995, four days after Plaintiff filed a claim with the EEOC, and Quaker was likely

attempting to avoid costly litigation. This evidence has little probative value, and moreover, because it is of the character of a settlement offer, it is likely inadmissible. Fed. R. Evid. 408. Thus, it must be excluded at this stage of the proceedings, and it cannot support a showing of pretext. Nor is the evidence of a settlement offer helpful for any other purpose. Accordingly, summary judgment is appropriate on this claim.

C. Arizona Public Policy

The Arizona Public Policy claim is premised on illegal discrimination. Having determined that no such discrimination existed in this case, summary judgment is appropriate as to this claim as well.

III. Plaintiff's ERISA Claim

Plaintiff asserts that Defendant violated § 510 of ERISA because it terminated him in an effort to avoid paying his pension benefits. Section 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140

Plaintiff bears the initial burden of establishing a prima facie case under this section. Plaintiff must provide evidence to raise the inference of: (1) prohibited employer conduct; (2) undertaken with the specific intent to interfere with the attainment of a protected right. See Dytrt v. Mountain State Telephone & Telegraph Co., 921 F.2d 889, 895 (9th Cir. 1990). To meet his burden Plaintiff must show: (i) he had an opportunity to obtain benefits under a covered plan; (2) he was qualified; and (3) his discharge gives rise to an inference of discrimination. See Dister v. Continental Group, 859 F.2d 1108, 1114 (2d Cir. 1988). If Plaintiff succeeds in establishing a prima facie case, the burden shifts to the Defendant to show a legitimate, nondiscriminatory reason for its actions. Ritter v. Hughes Aircraft Co., 58 F.3d 454, 457 (9th Cir. 1995).

First, there is no evidence, beyond mere cost savings, that Defendant acted with the intent to deprive Plaintiff of his pension benefits. Cost savings was the motivation for the RIF, as is usually the case. However, this simple fact does not equate to an intent to deny individuals their pension. Dytrt, 921 F.2d at 895. When the denial of a benefit is merely a consequence of an employer's actions, rather than the end goal, there is no violation of §510. Id. Moreover, as determined above, Quaker acted pursuant to legitimate business motivations.

IV. Breach of Contract

Plaintiff contends that a provision in Quaker's Code of Ethics modified his at-will employment relationship. Quaker contends that the language could not reasonably be interpreted to alter the at-will nature of employment, and that several

other documents received throughout Plaintiff's tenure at Quaker clearly stated that the nature of the relationship was at-will. In Arizona there is a presumption that all employment relationships are at-will. Duncan v. St. Joseph's Hosp. & Medical Ctr., 903 P.2d 1107, 1111 (Ariz. Ct. App. 1995). A policy manual may become part of an employment contract or mitigate the at-will doctrine when an employee is provided the manual and may reasonably rely upon it. See Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1036 (Ariz. 1985). An employer can avoid these possible consequences by providing a clear disclaimer, so that an employee will not reasonably rely upon the representation. Duncan, 903 P.2d at 1114.

The Code of Ethics reads as follows:

> All employment-related decisions will be based on the business skills and qualifications of the individual. Race, creed, age, color, national original, ethnicity or other factors unrelated to skills or qualifications may never be a basis for favoritism or any other discriminatory behavior. No employee should be advantaged or disadvantaged by characteristics unrelated to the skills and qualifications of the work.

Quaker contends that this is merely repeating its preexisting legal obligation, and no employee could reasonably rely upon it as creating a "for cause" exception. The court agrees. The language of the code of ethics is clearly an attempt to assure employees that Quaker intends to follow the law. Such protection is nothing new; it is a protection already provided by federal and state law. As such, Quaker employees were

already assured of such compliance through the applicable discrimination laws. However, it would be unreasonable for employees to assume that the code stood for even more. The language clearly portrays Quaker's intent to act with integrity; however, it is not probative on whether employees could be terminated for cause.

Moreover, Quaker reinforced the at-will nature of employment through other manuals and handouts. It regularly reiterated the nature of the employment relationships between the Company and its employees. Because of this reinforcement, employees had no reason to believe that their employee was anything but at-will. However, even if this were not true, Quaker acted pursuant to a reduction in force, a clearly work related reason, and judged its employees based on their qualifications. This action easily fell within the language of the Code of Ethics. As such, summary judgment is warranted on this claim as well.

IV. CONCLUSION

The court has reviewed Defendant's Motion for Summary Judgment and determined that, as to all counts, it is well-taken. Plaintiff's claims of discrimination, public policy, breach of contract, and ERISA are unsupported. Thus, the court will grant summary judgment and dismiss the case.

IT IS ORDERED denying Plaintiff's Motion for Partial Summary Judgment (doc. 132).

IT IS FURTHER ORDERED granting Quaker's Motion for Summary Judgment (doc. 136). The clerk is ordered to enter judgment and terminate this case.

IT IS FURTHER ORDERED granting Defendant's Motion to Strike Dr. Bardwell's Testimony (doc. 149).

IT IS FURTHER ORDERED granting Defendant's Motion for Summary Judgment on the Disparate Impact Claim (doc. 150).

IT IS FURTHER ORDERED denying Plaintiff's Motion to Strike (doc. 162).

IT IS FURTHER ORDERED denying, as moot, Plaintiff's Motion to strike supplemental authority (doc. 173).

DATED this ___ day of March, 1999.

/s/_____
Robert C. Broomfield
United States District Judge

Copies to counsel of record

APPENDIX E

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed March 10, 1999]

No. CIV 96-0822 PHX RCB

JERRY JENEY and PEGGY JENEY,
Plaintiffs,

vs.

THE QUAKER OATS COMPANY,
Defendant.

ORDER

Now pending before the court are Defendant's two Summary Judgment Motions, Plaintiff's Motion for Partial Summary Judgment, and related motions, filed by both sides, to strike certain testimony and exhibits. The court heard oral argument on the pending motions, as well as oral argument on additional pending motions in two companion cases, on July 27, 1998. Following oral argument, the court took all matters under advisement but elected to await full briefing and oral argument on an additional motion in one of the companion cases. Having carefully considered the issues raised and the parties' arguments, the court now rules.

BACKGROUND

Plaintiff began working for the Quaker Oats Company ("Quaker") December, 1996, when Quaker purchased the company where Plaintiff worked. Plaintiff began as a entry-level sales representative ("Sales Rep.") in the Quaker organization, a job similar to what he had performed for years with other organizations. Plaintiff worked for Quaker until approximately August 1, 1994, when he was eliminated as part of a nationwide re-engineering and reduction in force ("RIF") which eliminated almost all low level positions.

The 1994 RIF was not the first incident that threatened Plaintiff's job. Another restructuring had resulting in the elimination of Plaintiff's Sales Rep. position in 1993. However, impressed with Plaintiff's skills, Ken Willis, an individual in charge of staffing decisions, transferred Plaintiff to a newly created position in Phoenix, Area Retail Manager (" ARM"). As an ARM Plaintiff reported to Steve Shields, an individual whom Plaintiff assisted with various accounts in the Phoenix area. Plaintiff was apparently the only individual in the Phoenix market holding the position of an ARM. This position was the position Plaintiff held just prior to the 1994 RIF 5hat resulted in the loss of his job.

In connection with the 1994 RIF, a team of individuals rated each employee in the Phoenix market, and the markets nationwide, to determine which individuals would be eliminated. Individuals were rated in groups determined by the closest fit to their current job. Quaker looked at several factors, but especially focused on skills allegedly developed through headquarters ("HQ work"), including experience in "advanced fact-based selling," category expertise, and

strategic business planning. Other non-HQ skills considered included customer operations understanding, leadership and communication. In addition, all employees were evaluated based on "learning agility" and "versatility." Quaker's human resources department admittedly monitored the RIF process to insure that it did not have a negative effect on race or gender diversity within the company.[1] However, Quaker claims no such effect was ever detected, and, therefore, no adverse action was necessary. Thus, the ranking allegedly proceeded according to the criteria above.

Three of the factors involved HQ skills. According to Defendant, HQ work includes analyzing data, developing sales strategies, and marketing those strategies to executives. Those individuals in higher ranking jobs had more access to these skills. Therefore, Quaker asserts that ranking individuals in groups assured that lower-level employees were held to a lesser standard. Thus, individuals that held low level jobs were not held to the same standard as individuals within the highest ranking positions at Quaker.

The level of an employee's job within Quaker is distinguished by hay points. An increase of 100 hay points

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[1]In addition, during this time, Quaker had begun a program called "Workforce 2001." This program recognized that Quaker, like many companies, suffered from the "glass ceiling phenomenon." Although woman and minorities were well represented at lower levels, when the management level was examined they were nearly non-existence. Recognizing this, Quaker made a commitment, to increase its competitiveness, to try to reduce unnecessary barriers to women and minorities at the management level.

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equals a one level promotion. Plaintiff held a lower level position within Quaker, with 366 hay points. (The Sales Rep. position that he held previous to the ARM position was 301 hay points.) Because Plaintiff's job was unique, and all Sales Rep. positions were to be eliminated in the RIF, he was rated under the next closest available category of Customer Manager. Within this category, Plaintiff scored poorly in the areas reflecting HQ work skills. He scored average in the remaining areas. He received the overall grade of "B." He was not selected to fill one of the remaining sales jobs in Phoenix. Seven individuals ranked above Plaintiff. These individuals included Bryan Hardman, Gary Dewalt, Stephen Carter, Stacy Ring, Quentin Burrell, Brian Edge, and Jake Coleman.

After Quaker completed its ratings, it had to select individuals to fill six jobs within Arizona. Ken Willis made the selections. The first four jobs were Account Executives. These positions were fairly high level, at 636 or 732 hay points. The next position was a Broker Field Manager ("BFM") job, a high ranking position with 732 hay points. The final job was a Customer Manager, with 438 hay points. Willis selected Andrew Smith, Lisa Rodriguez, Steve Shields, and Jake Coleman as Account Executives. Smith, Shields, and Rodriguez all received an A rating within their group, and all had previously held positions at the 732 hay point level. Coleman received a B+, and had years of experience in HQ work. Willis selected Rod Brown to fill the Phoenix BFM position. Brown received a B+ rating within his group, and had managed brokers prior to the re-engineering. Finally, Willis selected Bob Dumais for the Customer Manager. Dumais had HQ experience and received a grade of B+. All six individuals are white, five were men, and at least three

were forty or older. However, not all of the six remained with Quaker.

After these decisions were announced in June, some employees rejected their positions, and some resigned prior to the effective date of the terminations pursuant to the RIF. Thus, new openings resulted. Smith elected to retire rather than accept his position as an Account Executive. Don Rucker, Quaker's new director, filled Smith's vacancy with Glen Synoground. Synoground had received an A rating during the evaluation. However, Synoground resigned within one month, and Rucker was forced to once again look for a replacement. He selected Bryan Hardman, a Customer Manager from Los Angeles who had received an A rating during his evaluation. Finally, in November of 1994, Steve Shields resigned. His position was filled by Dumais. This decision created a vacant Customer Manager position. Rucker selected Ken Oliver.

Plaintiff was considered for the vacant Customer Manager position. Rod Brown, his former manager, actually recommended him to Rucker. However, Rucker rejected the recommendation, stating that Plaintiff was not "promotable." Plaintiff alleges that this term meant "young."

Plaintiff believes that he was terminated because of his age, race or gender. Plaintiff and several other employees filed an age discrimination charge with the Equal Employment Opportunity Committee ("EEOC"). The EEOC issued a for cause determination stating that there was reason to believe Plaintiff was terminated on the basis of age. Plaintiff also filed a charge with the EEOC, claiming that he was discriminated against on the basis of sex and race, on November 11, 1996.

DISCUSSION

To grant summary judgment, the court must determine that in the record before it there exists "no genuine issue as to any material fact" and, thus, "that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether to grant summary judgment, the court will view the facts and inferences from these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. at 248. A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the nonmoving party. Id. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth specific facts demonstrating a engine issue for trial. See id. at 250. Finally, if the nonmoving party's evidence is merely colorable or is not significantly probative, a court may grant summary judgment. See, e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 484 .U.S. 1006 (1988).

I. Disparate Impact

Although Plaintiff secured a statistical expert rather early on in this case, the first blatant surfacing of a disparate impact theory occurred when Plaintiff filed this motion for partial summary judgment. No claim, clearly based on a disparate impact theory, is present in Plaintiff's complaint; moreover, Plaintiff had not moved to amend the complaint prior to filing this motion. Therefore, as a threshold matter the court must determine whether this claim is properly before it. In addition, if the court finds that it is not, the court must determine whether Plaintiff should be allowed to amend his complaint at this late stage of the proceedings.

Plaintiff contends that the disparate impact claim flows naturally from the factual basis of the disparate treatment claim, and that the production relating to the statistical expert should have alerted the Defendant to the fact that such a claim would be raised. Plaintiff cites Gomes v. AVCO Corp., 964 F.2d 1330 (2nd Cir. 1992) in support of this proposition. As an alternative theory, Plaintiff asks, if it finds there is a need for such an amendment, that the court allow him to amend his complaint. Specifically, he cites Fed. R. Civ. P. 15(a), which liberally allows the amendment of complaints, and notes the lack of prejudice to the Defendant if such an amendment is allowed.

Defendant disagrees. First, Defendant notes that, according to the scheduling order in this case, the deadline to amend the complaint expired nearly two years ago. Further, Defendant asserts that there would be sufficient prejudice in this matter because the addition of a disparate impact claim would have caused a change in strategy up to this point,

including altering the focus of discovery from certain terminated individuals to the workforce as a whole. Finally, Defendant points out that, in light of the scheduling order, this amendment would fall under Rule 16(b) rather than 15(a).

There is little Ninth Circuit precedent relating to the issue of whether a disparate impact theory naturally flows from a similar disparate treatment theory. However, District Courts within this circuit have refused to recognize such a theory when not properly alleged. Cf. Klein v. Boeing Company, 847 F. Supp. 838, 844 (W.D. Wash. 1994) ("Klein never asserted this claim prior to his opposition to Boeing's motion for summary judgment, nor has he moved to amend his complaint. Thus, this claim is not properly before the court."), in addition, several well-reasoned opinions within other circuits suggest that a disparate impact claim must be properly pled. See Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 641-42 (3rd Cir. 1993); AFSCME v. County of Nassau, 96 F.3d 644, 647 (2d Cir. 1996) (recited in factual background that "because [plaintiff] never amended its complaint to adequately plead a disparate impact claim, the only claim was intentional discrimination."); see also Dodaro v Pennsylvania Turnpike Commission, 872 F. Supp. 188, 192-194 (M.D. Penn. 1995); Ingram v. Per-Paid Legal Services, Inc., --F. Supp.--, 1998 WL 251664, *!1 n.4 (E.D. Okla. 1998). Because a complaint serves as a map for responsive pleadings and guides the litigation, there is little reason to allow an additional theory, in the absence of an amendment, merely because it stems from similar facts. Plaintiff's only cited authority does not suggest otherwise.

Gomes v. AVCO Corp. relates to a failure to include such a claim in the EEOC charge, prior to filing the lawsuit.

The District Court determined that the claim was barred because the Plaintiff failed to exhaust his administrative remedies. Gomes, 964 F.2d at 1334-35. The Second Circuit concluded that because the claim stemmed from the same factual basis as the disparate treatment claim included in the EEOC charge, it should not be barred. Id. However, the plaintiff in Gomes included the disparate impact claim within his Third Amended Complaint. Id. at 1332. Conversely, in the present instance, Plaintiff failed to include a disparate impact theory within his complaint. Gomes does not address this situation, and provides little guidance to the court. Because the complaint serves an important role in the litigation process, the court will not simply overlook this failure and proceed as if Plaintiff had adequately plead such a theory. Accordingly, this court must determine whether it should allow an amendment.

First, the court must consider whether this issue should be addressed under Rule 15(a) or 16(b). Because there is a scheduling order in this case governing the time for amendments, and because substantial time has passed since the court entered such order, and since the amendment deadline expired, the court concludes that this matter is governed by 16(b). See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). Rule 16(b) changes the liberal amendment policy provided by Rule 15(a).

> Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule t6(b)'s "good cause" standard primarily considers the diligence of the party seeking the amendment.

> The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." . . . Although the existence of [some] degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification.

Id. (citations omitted) (quoting Fed. R. Civ. P. 16(b)). Thus, before considering whether the amendment would be proper under Rule 15(a), the court must conduct an inquiry to determine whether Plaintiff has exercised diligence in this matter. Id.; see also Eckert Cold Storage v. Behl, 943 F. Supp. 1232-33 (E.D. Cal. 1996); Harmon v. Chater, 887 F. Supp. 1303, 1319 (N.D. Cal. 1995).

In the present case, Plaintiff secured his statistical expert over a year ago. Plaintiff has been in possession of the statistics in question for months. Plaintiff's failure to amend his complaint is surprising. Moreover, Plaintiff has repeatedly argued for rigid adherence to guidelines in this matter, even when Defendant missed particular deadlines by only days. This matter has been pending for over two years, and has progressed to the dispositive motion stage. Simply put, this request comes quite late in the proceedings without apparent good cause or diligence. Morever, regardless of the above factors, the court concludes that allowing an amendment at this stage of the proceedings is simply unjust. Defendant has likely pursued discovery under a strategy geared toward a disparate treatment claim. Cf. Dodaro, 872 F. Supp. at 193 ("[I]t is more likely that the [Defendant] conducted its

discovery believing that it faced only a disparate treatment claim."). To allow such claim at this point may require a reevaluation of this established strategy, in addition to additional discovery, and Defendant may well be prejudiced.

In summary, an amendment during this course of the litigation is undesirable. Such an amendment would do nothing to expedite these proceedings, and would likely prejudice defendant. Plaintiff has provided no indication that he failed to amend his complaint for good cause or even excusable neglect. Accordingly, the disparate impact claim is not properly before this court. Plaintiff's motion must therefore be denied, and Defendant's motion granted.

II. The Timeliness of the Race and Gender Discrimination Claim

Defendant asserts that Plaintiff failed to include a claim of race or gender discrimination in his EEOC complaint when it was originally filed. Rather, Plaintiff did not file such a charge until the required time to do so had passed. Plaintiff responds that the charge is timely because he lacked the factual basis to make such a claim prior to the time that he filed it.

Prior to filing a suit in a court of law, individuals believing that they have suffered an unlawful employment action must file a complaint with the EEOC. 29 U.S.C. § 2000e5 prescribes a time limitation for doing so. The statute requires individuals to file a charge of discrimination with the EEOC within 300 days of the alleged incident of discrimination. Id. However, like most statutes of limitation, this time limitation is "subject to waiver, estoppel, and

equitable tolling." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393-94 (1982).

In the present instance Quaker informed Plaintiff of its decision to terminate him on June 27, 1994. However, he did not file a Title VII charge with the EEOC until November 11, 1996, well after the 300 day limitation period. Plaintiff argues that the statute of limitations should be tolled because he did not discover facts to support his claim of race and gender discrimination until the fall of 1996, during formal discovery in this and related litigation. Defendant disagrees, and contends that Plaintiff's own statements during his deposition indicate that he suspected race and gender discrimination from the day that he was terminated. Thus, Defendant protests that the statute of limitations expired 300 days after Plaintiff was terminated, which would be April 23, 1995.

In his deposition, Plaintiff communicates that he suspected race or gender discrimination at Quaker even before he received word of his termination:

> Q. (By Mr. Harris): Other than that comment by Ms. Burns [that she allegedly wanted to hire a female], are you aware of any statement by any manager about wanting to hire a female or minority?
>
> A. Just grapevine things.
>
> Q. What have you heard through the grapevine in that regard?

A. That at certain times jobs had to be filled, or preferably filled by minorities.

* * *

Q. Did that talk ever lead you to think that maybe race or sex were going to be factors in employment decisions?

A. Yes.

Q. Did you complain to anybody?

A. No.

Q. Any reason why not?

A. Well, I -

Q. I mean, while you were employed, did you complain to anybody?

A. Not manager people.

Q. Did you complain to co-workers?

A. Well, sure.

Q. Who do you remember complaining to?

A. Probably just about everybody that was in my similar position.

* * *

Q. So is it your belief that race and sex were often factors, then, in employment decisions at Quaker?

A. Yes.

Q. And that's a complaint you expressed to Mr. Coleman and Mr. [Gentile]?

A. Yes.

Q. And that was while the three of you were still employed?

A. I believe so.

(Deposition of Jerry Jeney, 309-311). However, Plaintiff's deposition doesn't support the position that he had hard facts to back up his claims of discrimination. Thus, if such hard facts are necessary, Plaintiff's argument for equitable tolling may have merit. Plaintiff argues for this interpretation, and claims that Plaintiff had only "mere suspicion" prior to formal discovery efforts in this case. "It was not until the fall of 1996 when Plaintiff first believed he and been the victim of race and gender discrimination. . . . At that time, he discovered through formal discovery . . . that Quaker had a specific policy in force during the

reorganization to increase the number of women and minorities." (Plaintiff's Response, 8:8-12).

"The time period for filing a complaint of discrimination begins to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights." Boyd v. United States Post Office, 752 F.2d 410, 414 (9th Cir. 1985). If an aggrieved individual fails to exercise due diligence, equitable tolling will not apply. See Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990). Thus, the key question is whether a reasonably prudent person would have been put on notice of a potential discrimination charge, and whether Plaintiff exercised due diligence.

Plaintiff cites Hargett v. Valley Federal Savings Bank, 60 F.3d 754 (11th Cir. 1995) to support his case. In Hargett the plaintiff delayed his EEOC retaliation charge until a deposition revealed that he may have been retaliated against. The Hargett court determined that prior to the revelation in the deposition, the plaintiff did not have sufficient notice of a potential retaliation claim, because without the revelation, plaintiff could assume that any adverse action was merely tied to his age (he was pursuing an age discrimination claim.) Id. at 765. Prior events, including his failure to be rehired, simply did not provide the plaintiff "with sufficient facts to place a reasonable person on notice that retaliation had occurred." Id.

However, the present facts differ from the facts in Hargett in at least one key aspect. Here, Plaintiff did, in fact, suspect race or gender discrimination. He was not oblivious to the possibility, and was, by his own admission, suspicious

of improper considerations by Quaker beyond merely his age. His belief that supervisors took such considerations into account was enough to put him on notice. Thus, the doctrine of equitable tolling does not apply in this instance. Moreover, as demonstrated below, even if the court were to assume that the charge was timely, it fails regardless. See infra (IIB).

II. Disparate Treatment

Plaintiff argues that he was terminated as part of an overall plan to eliminate older, white males from Quaker's workforce. Thus, he argues that he was inappropriately terminated on the basis of age, gender and race. The prima facie case is similar under both Title VII and the ADEA.

To establish a prima facie case of discrimination under Title VII and the ADEA, Plaintiff must demonstrate that: (1) he is a member of the protected class; (2) he was qualified for the position that he held; (3) he was discharged; and (4) that he was replaced with an individual not in the protected class with equal or inferior qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Wallis v. J.R. Simplot, 26 F.3d 885, 888-891 (9th Cir. 1994). However, when a termination is the result of a reduction in force, a plaintiff does not necessarily need to demonstrate the fourth element. Rather, Plaintiff may produce direct or circumstantial evidence to give rise to an inference of discrimination on the basis of age. Wallis, 26 F.3d at 891.

A. AGE

Plaintiff argues that Quaker terminated an overwhelming and disproportionate amount of older

employees during the RIF. In addition, Plaintiff argues that, by virtue of his experience with Quaker, he was more qualified than the individuals retained. Quaker disagrees, arguing that Plaintiff was not qualified for the remaining jobs, the individuals retained had qualifications far superior to Plaintiff's and that, regardless, it terminated Plaintiff for nondiscriminatory reasons.

The court must first determine if Plaintiff can establish a prima facie case. Quaker specifically challenges Plaintiff's ability to show that he was qualified for the remaining positions, and that he was as qualified as those retained. Quaker does not dispute that Plaintiff is within the protected class or that he was terminated. Rather, Quaker notes that the positions of Account Executive and Broker Manager were three to four levels above Plaintiff's ARM position. It contends that such a promotion was unheard of at Quaker.

Plaintiff's own deposition testimony supports the position of Defendant. Plaintiff admits that such a large increase was unheard of within the organization. Thus, it is unlikely that Plaintiff could establish a prima facie case if the focus was on what Quaker dubs "the five big jobs." However, the remaining job, Customer Manager, was not on the same level as the other five, there is likely a question of fact as to whether Plaintiff was qualified.

Next, the court must determine whether Plaintiff was replaced by a member not in the protected class. In the present case, three of the original six individuals were over forty, and Smith was approximately the same age as Plaintiff. Therefore, Plaintiff does not easily meet the traditional test. However, Plaintiff lost his job pursuant to a RIF. Thus, he

may present circumstantial and other evidence to raise an inference of causation.

Plaintiff attempts to meet this burden through statistical evidence. Plaintiff relies upon the testimony of Dr. Bardwell. Bardwell's results suggest that the likelihood of Quaker achieving purely random results resembling the same negative affect on older employees is about 1 in 3 billion. However, this result was based on a "chi square" analysis, which involved no additional variables. Once Dr. Bardwell considered other variables the results were not as impressive. In fact, when broken down for extensive peer analysis, his results were not even significant. Defendant challenges Bardwell's testimony and moved to strike it on this basis.

While the court will not strike the testimony, as it is somewhat probative in the context of this litigation, it is not as probative as Plaintiff would like to suggest. The value of statistics evidence at the prima facie stage depends in large part on its reliability and its context. The failure to eliminate nondiscriminatory explanations for a disparity lowers the reliability and the value of the evidence. See Rose v. Wells Fargo, Co., 902 F.2d 1417, 1423 (9th Cir. 1990) (statistic evidence should eliminate other possible nondiscriminatory grounds for termination). In the present instance, Dr. Bardwell did not consider the market, did not consider the various jobs from which individuals were rated, did not consider the proliferation of older individuals in entry level position (which were completely eliminated), the education of individuals, nor other factors that may have explained different variances. The failure to eliminate these other variables is telling, and the court is unable to make much of an inference of discrimination based on these statistics without

other independent evidence of discrimination. See, e.g., Rea v. Martin Marietta Corp., 29 F.3d 1450, 1456 (10th Cir. 1994)(statistics evidence does little to support an inference of discrimination where it fails to eliminate possible nondiscriminatory explanations for the disparity); see also Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997)(arbitrary omissions and failure to inspect other variables render statistical evidence of little value and possibly inadmissible). Thus, it is unlikely that Dr. Bardwell's statistics alone are sufficient to support a prima facie case.

Moreover, the EEOC's finding of cause, in the absence of relevant facts, does not raise an inference of discrimination. This court is not bound by the determination, and in light of the absence of sufficient factual support, this court will not determine that Plaintiff has met his probable cause burden based on this determination alone. In any event, even if Plaintiff managed to raise a question of fact as to whether he has met his probable cause burden, he still cannot defeat Defendant's motion.

Once a Plaintiff establishes a prima facie case, the burden shifts to Defendant to offer a legitimate non-discriminatory reason for the decision. Defendant claims that its decision was nothing more than a decision to reduce and re-engineer its workforce to save money and to improve its operations. Defendant further argues that the decision to terminate Plaintiff was made pursuant to a non-discriminatory ranking system. Moreover, Defendant contends that the individuals selected for the position of Customer Manager were simply better qualified. The court agrees.

A reduction in force is a legitimate non-discriminatory reason for Defendant's decision to terminate Plaintiff. Rose, 902 F.2d at 1423. Thus, Plaintiff must offer evidence to show that this reason was a pretext for discrimination. Finally, Dumais ranked higher than Plaintiff in the evaluation process. In addition, Dumais' replacement had worked for the broker and new him well, and was determined to be promotable.

First, Plaintiff looks to the same statistical evidence used to support his prima facie case, and asserts that the great disparity demonstrated by such evidence shows evidence of pretext. As discussed above, where the statistics do not take into consideration possible nondiscriminatory reasons for the disparity, they are worthy of little weight. Bardwell failed to consider the specifics of Plaintiff's position in formulating the statistics. This failure is even more telling at the pretext stage, because the statistics show little about the individual decisions made about Plaintiff. See Penk v. Oregon State Bd. Of Higher Educ., 816 F.2d 458, 462 (9th Cir. 1987) ("[W]hile statistics are often probative in determining the existence of a pattern or practice of disparate treatment, their usefulness in proving pretext 'depends primarily upon their relevance to the specific decision affecting the individual plaintiff. . . .'"). As discussed above, these statistics focused on the overall RIF, and, additionally, they failed to take into account the crucial variables involved. This is important, as the statistics did not account for the fact that Plaintiff was an ARM just prior to the RIF, that he was rated within the Customer Manager group, or his particular rating. This failure to focus on Plaintiff's situation and failure to control for obvious variables affects the reliability of the statistics even more at the pretext stage. See Rose, 902 F.2d at 1423; Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 777-78 (8th Cir. 1995) (statistics

that fail to control for obvious variables not probative evidence of pretext). Thus, the statistics do little to show the motive of Defendant in terminating Plaintiff. Hence, the statistics do not raise an inference of pretext.

In addition, foreseeing the probability that Quaker would look to the subjective criteria and the rating system used during the RIF, Plaintiff retained two experts, Dr. Eisen and Dr. Blackwood, to attack the nature of Quaker's criteria.[2]

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[2]This expert testimony was the subject of a motion to strike. Defendant objects to the testimony because Plaintiff produced it outside the normal course of discovery. That is, Plaintiff offered these witnesses after the court allowed additional time to produce rebuttal statistics experts, and Defendants contend that the experts exceed the scope of what the court allowed.

Plaintiff contends that the experts were offered to rebut the testimony of Defendant's statistical expert, Dr. Ward. Dr. Ward testified that the criteria used to evaluate Quaker employees was the single most important factor to determine whether age played any role in the decision making, and whether such a determination had any statistical significance. Essentially, Ward testified that without considering additional factors, it would be impossible to evaluate the data properly.

Plaintiff argues that the expert testimony attempting to invalidate this criteria is essential to rebut Dr. Ward. However, Plaintiff misses the mark. Dr. Ward testified that the criteria would have to be considered in the context of statistical analysis. He did not testify about the quality of such criteria. Thus, it is not important that the criteria may not have been the most reliable evaluation of performance.

While the testimony would properly be excluded as untimely, the court will consider it as this point in an effort to view Plaintiff's evidence in its most favorable light. In any event, the

Essentially, the experts' testimony, simplistically summarized, suggests that the criteria was poorly created, vague, subjective, and unreliable. In addition, the evidence suggests that objective tests could have been used by Quaker in place of its subjective formula. Even if the court were to accept this evidence without question, it does little more than criticize Quaker for making an unwise business move. The discrimination laws are not designed to punish such decisions. See Sharpe v. AT&T Corp., 66 F.3d 1045, 1050 (9th Cir. 1995) (court should not second guess business judgment). The court is unable to make the inferential leap that Plaintiff advocates and accept these facts as evidence of pretext. Plaintiff has not even suggested that Quaker experts purposefully rejected the objective tests. Nor is there evidence that Quaker decisionmakers knew that their process was faulty. Rather, at best, all that Plaintiff has established is that Quaker may have exercised poor judgment during the RIF. This fact does not suggest that the criteria was selected so that Quaker could discriminate, or that Quaker truly did not follow its own criteria but merely claimed to do so. In sum, this evidence does not raise an inference that Quaker's true motivation was discrimination.

Third, Plaintiff attacks the use of the word promotable, arguing that Rucker used it as a synonym for young. No evidence, other than Plaintiff's self-serving affidavit supports this contention. Moreover, it is perfectly reasonable to consider the promotability of an employee,

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testimony of Dr. Eisen and Dr. Blackwood does little to aid Plaintiff at this point in the proceedings. The motion to strike will be denied as moot.

especially considering Quaker's concern that its Customer Managers be able to move up quickly. This concern does not equate to age discrimination, and Plaintiff's own subjective belief cannot create a question of fact on this issue.

Finally, Plaintiff contends that the selection of unqualified people raises an inference of pretext. All Plaintiff offers to support this claim, however, is his subjective belief and the repetitive argument that he had been with Quaker longer. Without further evidentiary support, these contentions offer little to support a showing of pretext. Quaker has adequazely demonstrated why each individual was suited for the position Quaker selected them for. Mere accusations of discrimination cannot create an inference that these decisions were discriminatory. See Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1061 (9th Cir. 1989); Williams v. Williams Elec., Inc., 856 F.2d 920, 924 (7th Cir. 1988). Even if they were unwise, as discussed above, this does not suggest pretext unless Plaintiff can offer sufficient evidence that the individuals are unqualified or lack the skill that Quaker contends they possess. Plaintiff's allegations fall far short of this mark.

Accordingly, Plaintiff cannot rebut Quaker's legitimate nondiscriminatory reason, and summary judgment is appropriate.

B. RACE AND GENDER

Although this claim is likely barred due to Plaintiff's failure to timely exercise his administrative rights, the court will look to the merits. Summary judgment is appropriate regardless, as Plaintiff cannot establish a prima facie case.

In regard to his race and gender claim, Plaintiff must again look to circumstantial evidence of discriminatory intent to establish a prima facie case, because all but one of the employees retained were male and several were white, and because the question involves a RIF. Plaintiff is not armed with statistical data to show any disproportion. Rather, Plaintiff looks to Quaker's objectives within a project called Workforce 2001, and argues that Quaker's intent to increase the diversity of its organization also shows its intent to reduce the population of white males within its ranks. In addition, Plaintiff argues that this was an overall goal of the RIF, and that human resource employees monitored the RIF to insure that it did not have an impact on minorities, pursuant to the Workforce 2001 objectives.

Quaker does not argue that it did not have an overall desire to increase diversity at the management level. Rather, it states that the overall goal of Workforce 2001 was formulated as a competitive strategy in response to data showing that management positions within Quaker were <u>not</u> diverse, and that women and minorities were facing the glass ceiling phenomenon within the company. Moreover, it agrees that it monitored the RIF to guarantee that it did not have a proportionally negative effect on women or minorities. However, it argues that the data reflected that no such effect resulted from the unassisted rating process, and therefore, Quaker did not undertake any special effort to protect such minorities.

The exhibits, included with Plaintiff's Response, make it clear that Workforce 2001 had the overall goal of increasing diversity at the management level. This effort was in response to the significant lack of such minority representation at high

levels in Quaker. However, no evidence suggests that this goal was to be accomplished through illegal means. On the contrary, it appears that Quaker desired to eliminate any improper barriers to women and minorities. This step is perfectly legitimate in the face of evidence that shows current practices may have a negative impact on minorities. Plaintiff has not produced any evidence to show that Quaker intended to promote unqualified or less qualified women and minorities at the expense of white males. Such a goal would in fact be improper. However, the goals of attracting a wider range of applicants and creating an even playing field for all individuals, which may necessarily result in fewer management jobs going to white males, are not improper. Plaintiff's objection to the result does not make the method or intent illegal, and no evidence exists to suggest otherwise. As such, Plaintiff is unable to state a prima facie case of race or gender discrimination, and summary judgment is proper on this claim.

Moreover, even if Plaintiff could establish a prima facie case of race or gender discrimination, he could not successfully rebut Quaker's legitimate non-discriminatory reason. As noted above, Quaker had the legitimate goal of reducing costs through a RIF, and the individuals retained were well qualified for the positions.

C. Arizona Public Policy

The Arizona Public Policy claim is premised on illegal discrimination. Having determined that no such discrimination existed in this case, summary judgment is appropriate as to this claim as well.

III. Plaintiff's ERISA Claim

Plaintiff asserts that Defendant violated § 510 of ERISA because it terminated him in an effort to avoid paying his full pension benefits. Section 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .

29 U.S.C. § 1140

Plaintiff bears the initial burden of establishing a prima facie case under this section. Plaintiff must provide evidence to raise the inference of: (1) prohibited employer conduct; (2) undertaken with the specific intent to interfere with the attainment of a protected right. See Dytrt v. Mountain State Telephone & Telegraph Co., 921 F.2d 889, 895 (9th Cir. 1990). To meet his burden Plaintiff must show: (1) he had an opportunity to obtain benefits under a covered plan; (2) he was qualified; and (3) his discharge have rise to an inference of discrimination. See Dister v. Continental Group, 859 F.2d 1108, 1114 (2d Cir. 1988). If Plaintiff succeeds in establishing a prima facie case, the burden shifts to the Defendant to show a legitimate, nondiscriminatory reason for its actions. Ritter v. Hughes Aircraft Co., 58 F.3d 454, 457 (9th Cir. 1995).

First, there is no evidence, beyond mere cost savings, that Defendant acted with the intent Eo deprive Plaintiff of his pension benefits. Cost saving was the motivation for the RIF, as is usually the case. However, this simple fact does not equate to an intent to deny individuals their pension. Dytrt, 921 F.2d at 89596. When the denial of a benefit is merely a consequence of an employer's actions, rather than the end goal, there is no violation of §510. Id. Moreover, as determined above, Quaker acted pursuant to legitimate business motivations.

IV. Breach of Contract

Plaintiff contends that a provision in Quaker's Code of Ethics modified his at-will employment relationship. Quaker contends that the language could not reasonably be interpreted to alter the at-will nature of employment, and that several other documents received throughout Plaintiff's tenure at Quaker clearly stated that the nature of the relationship was at-will. In Arizona there is a presumption that all employment relationships are at-will. Duncan v. St. Joseph's Hosp. & Medical Ctr., 903 P.2d 1107, 1111 (Ariz. Ct. App. 1995). A policy manual may become part of an employment contract or mitigate the at-will doctrine when an employee is provided the manual and may reasonably rely upon it. See Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1036 (Ariz. 1985). An employer can avoid these possible consequences by providing a clear disclaimer, so that an employee will not reasonably rely upon the representation. Duncan, 903 P.2d at 1114.

The Code of Ethics reads as follows:

> All employment-related decisions will be based on the business skills and qualifications of the individual. Race, creed, age, color, national original, ethnicity or other factors unrelated to skills or qualifications may never be a basis for favoritism or any other discriminatory behavior. No employee should be advantaged or disadvantaged by characteristics unrelated to the skills and qualifications of the work.

Quaker contends that this is merely repeating its preexisting legal obligation, and no employee could reasonably rely upon it as creating a "for cause" exception. The court agrees.

The language of the code of ethics is clearly an attempt to assure employees that Quaker intends to follow the law. Such protection is nothing new; it is a protection already provided by federal and state law. As such, Quaker employees were already assured of such compliance through the applicable discrimination laws. However, it would be unreasonable for employees to assume that the code stood for even more. The language clearly portrays Quaker's intent to act with integrity; however, it is not probative on whether employees could be terminated for cause.

Moreover, Quaker reinforced the at-will nature of employment through other manuals and handouts. It regularly reiterated the nature of the employment relationships between the Company and its employees. Because of this reinforcement, employees had no reason to believe that their

employee was anything but at-will. However, even if this were not true, Quaker acted pursuant to a reduction in force, a clearly work related reason, and judged its employees based on their qualifications. This action easily fell within the language of the Code of Ethics. As such, summary judgment is warranted on this claim as well.

V. CONCLUSION

The court has reviewed Defendant's Motion for Summary Judgment and determined that, as to all counts, it is well-taken. Plaintiff's claims of discrimination, public policy, breach of contract, and ERISA are unsupported. Thus, the court will grant summary judgment and dismiss the case.

IT IS ORDERED denying Defendant's Motion to Exclude Plaintiff's Expert Witnesses (doc. 161).

IT IS FURTHER ORDERED denying Plaintiff's Motion for Partial Summary Judgment (doc. 166).

IT IS FURTHER ORDERED granting Quaker's Motion for Summary Judgment (doc 170). The clerk is ordered to enter judgment and terminate this case.

IT IS FURTHER ORDERED denying Defendant's Motion to Strike Dr. Bardwell's Testimony (doc. 182).

IT IS FURTHER ORDERED granting Defendant's Motion for Summary Judgment on the Disparate Impact Claim (doc. 183).

IT IS FURTHER ORDERED denying, as moot, Plaintiff'S Motion to . . . Strike (doc. 203).

DATED this ___ day of March, 1999.

/s/_____
Robert C. Broomfield
United States District Judge

Copies to counsel of record

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed December 8, 2000]

No. 99-15887

JOSEPH GENTILE and LORRAINE GENTILE, husband and wife, *Plaintiffs-Appellants*,	)
v.	)
THE QUAKER OATS COMPANY, a New Jersey corporation, *Defendant-Appellee*.	)

Appeal from the United States District Court
for the District of Arizona

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

* * * * *

I. STATEMENT OF COUNSEL

Joseph P. Gentile and Lorraine Gentile, husband and wife (collectively "Gentile"), seek rehearing and suggest rehearing *en banc* of the November 20, 2000 panel decision (B. Fletcher, W. Canby, and D. O'Scannlain), which contradicted established law in this circuit and the United States Supreme Court in evaluating the evidence necessary to defeat summary judgment under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*

The panel, Judge Fletcher dissenting, held that (a) Gentile failed to raise genuine issues of material fact precluding summary judgment, (b) disparate impact under the ADEA must be pled separately from disparate treatment, and (c) the trial court did not abuse its discretion by denying a motion for leave to amend to separately plead disparate impact, if it is required to be particularly pled.

Rehearing *en banc* is required because the panel opinion directly conflicts with many decisions of this Court,[1] as well as those of the United States Supreme Court, and involves questions of national, exceptional significance. The panel opinion requires direct evidence of an employer's animus against employees over 40 years of age ("Older

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[1] *En banc* review is proper to resolve irreconcilable conflicts between circuit precedent. *Antonio v. Wards Cove Pckg.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) *(en banc)*.

Employees") in order for plaintiff to secure a jury trial under the ADEA. The panel opinion also directly contravenes Rule 8(a), Federal Rules of Civil Procedure ("the Rules") (short and plain statement of claim).

II. BACKGROUND FACTS

In 1994, Quaker instituted a nationwide reduction in force ("RIF") . Gentile, a highly awarded Quaker employee, who was then 53 years of age and who had worked for Quaker for 16 years, was terminated. Sixty-three percent of the Quaker employees under 40 years of age ("Younger Employees") were retained, while only 35% of Quaker Older Employees were retained. In determining whom to terminate, Quaker used a rating system not previously or subsequently used by it, applying subjective, undefined criteria applied in an average of nine minutes per employee by people who had ever used the rating system before, who had no personal knowledge of Gentile's abilities, and who **NEVER** checked with Gentile's immediate supervisor to make the ratings.

Older Employees received **NONE** of the highest ratings, but received the vast majority of the low ratings. The Equal Employment Opportunity Commission ("EEOC"), after four years of investigation, concluded that Quaker violated the ADEA regarding the RIF.

In awarding summary judgment, Quaker contended, and the trial court agreed, that Quaker was "changing the way it went to market." The trial court, and this Court, displaced the jury by weighing evidence, parsing the evidence rather than considering the totality of the circumstantial evidence,

and totally disregarded substantial, unbiased third-party evidence, including:

a. The EEOC determination of discrimination;

b. The affidavit of an actual buyer for a supermarket buying Quaker products revealing that Quaker **DID NOT** change "the way it went to market"; and

c. The affidavit of Gentile's prior supervisor for over 10 years (who no longer fed at the Quaker trough), highly praising Gentile's analytical and other skills.

To the contrary, the court relied entirely upon Quaker's *ipse dixit* that it did not violate the ADEA, i.e., its self-fulfilling subjective ratings of employees to be terminated made in nine minutes by a person with no knowledge of the skills of the employee and without checking with his direct supervisor. Moreover, the Court accepted Quaker's trial expert's defense of its system, which was based upon supposed criteria **NOT** actually used by Quaker in its ratings.

III. PETITION FOR REHEARING EN BANC

A. The Panel Opinion Violates Established Ninth Circuit Law Allowing Disparate Impact Claims And Violates Express Ninth Circuit And United States Supreme Court Authority Regarding Notice Pleading.

The Ninth Circuit recently reaffirmed that proof of disparate impact establishes a claim for age discrimination. *See Katz v. Regents of the University of California,* 229 F.3d

831 (9th Cir. 2000); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000).[2] The majority opinion in this case refers to the disparate impact theory as an "assumed theory." *See Slip Op.*, f 6, p. 14948.

Notwithstanding the majority opinion's disdain for the disparate impact theory, it exists until the Ninth Circuit either reverses itself or the United States Supreme Court holds to the contrary. Neither has occurred. As the dissent noted, the majority is wrong for the following reasons:

1. A disparate impact theory lies under the ADEA.

2. The words "disparate impact" need not be pled to assert a claim under the ADEA. *EEOC v. Local 350,* 998 F.2d 641, 648 n 2 (9th Cir. 1993).

3. Pleadings are liberally construed and a claim for age discrimination may be proved by both disparate treatment and disparate impact evidence. *Cotton v. City of Alameda,* 812 F.2d 1245, 1247 (9th Cir. 1987); *Palmer v. United States,* 794 F.2d 534, 538 (9th Cir. 1986); *Golden v. Local 55 of International Association of Firefighters,* 633 F.2d

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[2]In *Frank,* Judge O'Scannlain dissented, contending that *Arnett v. California Public Employees Retirement System,* 179 F.3d 690, 697 (9th Cir. 1999), *vacated and remanded on other grounds,* ___ U.S. ___, 120 S.Ct. 930 (2000), did not authorize the disparate impact theory in the Ninth Circuit and/or that plaintiff had waived the issue on appeal. Writing for the majority in this case, Judge O'Scannlain curiously fails to even cite *Katz* or *Frank.*

817, 821 (9th Cir. 1980). *Slip Op.*, pp. 14960-61 and fn 2 thereof.

The complaint[3] alleged that Gentile was unlawfully discriminated against in violation of the ADEA.[4] The complaint neither contains the words "disparate impact" nor "disparate treatment." As the dissent stated:

> Since a plaintiff may prove discrimination using either theory, the complaint was sufficient to state both a disparate treatment and disparate impact claim.

Slip Op., pp. 14962-63.

The United States Supreme Court adopted "notice pleading" decades ago. Justice Black, writing for the United

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[3]CR 86 (references to "CR ___" are to Clerk's Record on appeal and corresponding item number); AE, pp. 52-59 (references to "AE, pp. ___" are to pages in Appellant's Excerpts).

[4]The identical complaint involving other Quaker employees terminated in the same RIF was transferred by the trial court to the United States District Court for the Western District of the State of Washington. Quaker argued then that disparate impact had not been pled. By Order dated July 22, 1998, the trial court held that the complaint need not separately plead disparate impact and, if disparate impact needed to be specifically pled, there was no reason to deny leave to amend. App. Ex. "l,"(references the Appendix hereto); QE, pp. 1128-31 (references to "QE, pp. __" are to Quaker's Excerpts).

States Supreme Court in 1957, described the purpose of notice pleading:

> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is *"a* short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. (cite omitted)

Connelly v. Gibson, 355 U.S. 41, 47-48 (1957) (footnotes omitted) (emphasis added).

Notice pleading, as recently construed by this Court in *Bautista v. L.A. County,* 216 F.3d 837, 840 (9th Cir. 2000) (O'Scannlain dissenting), requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The concurring opinion of Judge Reinhardt directly conflicts with the majority in this case:

> Particularity is required only for those actions involving averments of fraud or mistake, as listed under Rule 9(b). [cite omitted] The federal rules otherwise "do not require a claimant to set out in detail the facts upon which he bases the claim." *Connelly, 355 U.S. at 47.* Indeed, this Court has penalized litigants who fail to comply with "Rule 8's requirement of simplicity, directness and clarity."

Id. at 842. Judge Reinhardt further underscored the foundation of the Rules:

> [D]evotion to federal rules is desirable and commendable if they are implemented with some flexibility and understanding. In our zeal to preserve their inviolability, however, sometimes even the best and brightest of us fails to see the forest for the trees. We sometimes overlook the reason for the rule's existence and examine a complaint with the eyes of a laboratory technician, rather than with those of a dispenser of a justice.

Id. at 844.

The complaint alleged a claim for unlawful discrimination under the ADEA. It did not plead evidentiary facts. It did not, nor was it required to, state "disparate treatment" or "disparate impact" under Ninth Circuit case law and the Rules.

The complaint, the discovery,[5] including reports of the experts hired by Gentile and delivered to Quaker, along with the four-year investigation by the EEOC, clearly apprised Quaker of plaintiff's evidence of disparate impact, namely, statistical proof that older workers were discriminated against under the policies, procedures, and practices of Quaker. Quaker was told in 1996 in plaintiff's expert disclosures:

> Dr. Bardwell will testify as to the statistical significance of Quaker's 1994 [RIF] and the negative disparate impact it had on [Older Employees] . . .

CR 41, App. Ex. "3." These disclosures suffice even under the majority opinion. Slip Op. 14952-53.

As the dissent points out, Quaker also had within its sole care, custody, and control all of the relevant evidence and numbers reflecting what it did, when, and what it did not do. Early and often, Quaker was given the results of the expert hired by Gentile. The expert was deposed twice by Quaker, obviously before the end of discovery.

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[5]Quaker had notice of the disparate impact theory and evidence no later than September 16, 1996 (years before the conclusion of discovery). See plaintiff's disclosure, CR 41, App. Ex. "2."

Even if some unwritten special pleading rule applies to ADEA claims relying on evidence of disparate impact, it was a clear abuse of discretion to deny leave to amend the complaint. Quaker was aware of the theory not later than September 1996. This matter was **NEVER** set for trial. No pretrial conference had even been held.

Gentile reasonably believed that all theories of discrimination available and supported by evidence were within the complaint for age discrimination when he filed his motion for summary judgment regarding disparate impact in May 1998. Prior decisions of this Court did not require that there be a separately pled count for disparate impact and a separately pled count for disparate treatment[6] in order to be cognizable by the trial court.[7]

If this Court is to engraft upon Rule 9(b) of the Rules a new exception to notice pleading, it should only do so prospectively, not retroactively.

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[6]The majority acknowledges that no prior decision of this Court required such a pleading. *Slip Op.*, p. 14948. *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993), is inapposite (it did not result from a company-wide RIF, where disclosures and statistical evidence were provided during discovery, nor where the EEOC investigated the company-wide RIF) . It also conflicts with this Court's prior precedent. *See* Slip Op., Dissent, pp. 14959, *et seq.*

[7]Gentile had only one claim for discrimination under the ADEA (not two).

B. <u>The Opinion's Approval Of Subjective Criteria To Mask Discrimination Is Contrary To Ninth Circuit Law</u>.

The Opinion validates use of subjective criteria to justify a RIF terminating two-thirds of the Older Employees, but only one-third of the Younger Employees. It does so, notwithstanding the evidence that the linchpin ratings were a mask for discrimination, made by persons without personal knowledge of the attributes of the employees terminated and without speaking to their direct supervisors. If Older Employees may be terminated on this sham, the ADEA is dead.

The Opinion, however, is contrary to the law of the Ninth Circuit. The Opinion relies upon *Sengupta v. Morrison-Knudsen Co, Inc.*, 804 F.2d 1072 (9th Cir. 1986) , which dealt with materially different facts. In *Sengupta,* the ratings were done by an immediate supervisor, were based solely upon the last written evaluation (an evaluation previously used for all other employment decisions), not a new, subjective, undefined rating system used solely for the purpose of a RIF. The ratings included 11 categories, only three of which the court identified as "subjective." *Id.* at 1073. The ratings in *Sengupta* were applied uniformly throughout the company, not simply constructed for the specific job, nor the specific unit in which the plaintiff was located.

Moreover, subsequent Ninth Circuit decisions clearly limited *Sengupta* and held that the use of subjective criteria creates an inference of discrimination. In *Warren v. City of Carlsbad,* 58 F.3d 439, 443 (9th Cir.1995), this Court

reversed summary judgment for the employer. The Court noted that the employee's burden in opposing summary judgment was **not great** and held that the employee met his burden by presenting statistics similar to those presented by appellants, evidence of derogatory comments about the nationality of the protected person, and inferences from the subjective evaluation of the protected person. This Court stated:

> Although "in many situations, subjective criteria are indispensable to the process of selection in which employers must engage" *[citing Sengupta],* [plaintiff] was never evaluated formally on his ability to work with people. We have previously stated that "subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized." (cites omitted)

Accord: Jauregui v. City of Glendale, 852 F.2d 1128 (9th Cir. 1988) (confirming that inferences of discrimination arise from the use of subjective evaluations); *EEOC v. Insurance Co. of N. Am.,* 49 F.3d 1418, 1421 (9th Cir. 1995) (terms such as "overqualified" must be objectively defined, lest the term serve only "as a mask for discrimination").

The majority's conclusion that subjective ratings by people without knowledge, without checking with the immediate supervisor of the rated person, made in an average of nine minutes under a rating system never before used, using undefined criteria is directly and irreconcilably contrary to Ninth Circuit precedent. Moreover, the conclusion makes

a mockery of the "justice" system, as well as the ADEA. If this decision stands,[8] the ADEA is a sham.

C. The Opinion Violates Established United States Supreme Court And Ninth Circuit Law Concerning Summary Judgment.

In June 2000, in an ADEA case, the United States Supreme Court held that a *prima facie* claim of discrimination was sufficient for a jury to determine whether discrimination in fact occurred. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000). The trial court had granted judgment notwithstanding the verdict to the employer, negating the judgment of the jury. In reversing and directing entry of judgment for plaintiff, the Supreme Court identified the required showing by a plaintiff in a discrimination suit.

> [A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Id. at 120 S.Ct. at 2109.

Although the United States Supreme Court recognized that summary judgment was not impossible for an employer

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[8]If the decision stands, it should clearly identify the circumstances justifying purely subjective criteria so that all employers may evade the ADEA.

in a discrimination suit, summary judgment could only be entered when the "record conclusively revealed" a nondiscriminatory reason for the employer's decision.

> Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational fact-finder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. [cite omitted]

Id. (emphasis added). Moreover, the United States Court further reiterated underlying concepts of summary judgment:

1. "The court must draw all reasonable inferences in favor of the non-moving party."

2. "[The court] may not make credibility determinations or weigh the evidence.[9]

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[9]The majority applied *Reeves* backward. It believed all Quaker evidence, which a jury was not required to believe, and

> [cite omitted] 'Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.' [cite omitted] Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. [cite omitted] That is, the court should give credence to the evidence favoring the non-movant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached,at least to the extent that the evidence comes from disinterested witnesses.'"

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disregarded Gentile's evidence and evidence from independent third parties. The Court cites Gentile's rating from a year before the RIF and disregards the actual rating in 1994 at the time of the RIF (GE, p. 280), disregards contemporaneous merit awards to Gentile in 1993, disregards the fact that Martinez, the rater, had been in the division for less than one year and had no personal knowledge of Gentile's skills, and disregards the evaluation by Gentile's supervisor for the prior 10 years. (AOP, pp. 15-18, 33-38 (references to "AOP, pp. " are to Appellant's Opening Brief); App. Ex. "3"; AE, pp. 298-301.) This weighing of evidence was a jury function!

Id. 120 S.Ct. at 2110.[10]

In August 2000, this Court recognized its obligations under Reeves, stating:

> As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. This is because the "ultimate question is one that can only be resolved through a searching inquiry - one that is most appropriately conducted by a factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996) (citations and internal quotation marks omitted). Here, contrary to Federal Rule of Civil Procedure 56, the district court did not evaluate the facts in the light most favorable to the Chuangs, but instead resolved material facts that were disputed and disregarded other important evidence. As we will explain, the record supports a finding of illegal discrimination by Davis on two of the Chuangs' claims and warrants a resolution by trial on those claims.

Chuang v. University of California, Davis, 225 F.3d 1115, 1124 (9th Cir. 2000) (emphasis added). This Court further

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[10]The majority creates a higher standard for a non-movant in ADEA cases, contrary to the law.

acknowledged that under *Reeves* a discrimination plaintiff need not produce evidence beyond a *prima facie* case where there is a genuine issue of fact concerning "the truth of the employer's proffered reasons." *Id.* at 1127.

Gentile's evidence meets or exceeds the standards of *Reeves* and *Chuang*. It included:

1. The person rating Gentile:

a. Did not have personal knowledge of Gentile's performance,

b. Did not check with Gentile's direct supervisor for information for the rating and disregarded his current analysis of Gentile,

c. Spent an average of nine minutes per employee rated, and

d. Used a never-before-used system based on vague and undefined, subjective "standards."[11]

2. Gentile's supervisor[12] for over 10 years praised his analytical, computer, and other selling skills. AOB, pp. 17-18; ARB, pp. 15-16 (references to "ARB, pp. __" are to Appellant's Reply Brief); App. Ex. "3"; AE, pp. 298-301.

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[11]AOB, pp. 33-38; ARB, pp. 17-18.

[12]The supervisor no longer was employed by Quaker and was an independent witness.

3. Buyers of Quaker products debunked the Quaker notion that Quaker had a "new way of going to market." App. Ex. "4," AE, pp. 302-03.

4. After four years of investigation, the EEOC found Quaker violated the ADEA.[13] "The EEOC's report was sufficient at least to create an issue of fact . . ." *Gilford v. Atchison, Topeka and Santa Fe,* 685 F.2d 1149, 1156 (9th Cir. 1982) (B. Fletcher writing for the Court).

5. Statistical evidence[14] of the same type previously approved by this Court was used. *See Warren v. City of Carlsbad,* 58 F.3d 439, 443 (9th Cir. 1995) (statistical analysis of the impact of employer policy and practice helpful to determine if a discharge was in conformance with a pattern

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[13]An EEOC determination is admissible as probative evidence of discrimination *(Hegne v. Caruso,* 69 F.3d 1475, 1483 (9th Cir. 1995)); AOB, pp. 20-22; ARB, p. 19. While acknowledging the admissibility of the evidence, the Court chooses to ignore it and Ninth Circuit precedent. The weight of evidence, particularly an EEOC determination of reasonable cause, is for the jury. *Reeves.*

[14]Quaker did not use "education" to explain its ratings, although its trial expert sought to explain the disparate ratings using education. The majority adopts the expert's explanation and other invented criteria even though questions of fact existed. See AOP, pp. 33-36. Whether a degree from Bod Fish State in basket weaving meant anything was a question for the jury. AOB, pp. 41-42; AE, pp. 36276. Under the majority's flawed analysis, Bill Gates of Microsoft is "unworthy" because he lacks a college degree. While a jury might come to a similar result, it is a jury, not a court, function. *Reeves.*

of discrimination); *Jauregui v. City of Glendale,* 852 F.2d 1128, 1136 (9th Cir. 1988) (statistical data showing substantial disparity between protected persons employed in the city and in the county was sufficient evidence to sustain judgment for employee).

Moreover, Dr. Bardwell's statistical evidence was not limited to a single calculation, i.e., three out of 100 billion chance that discrimination did **NOT** occur. Dr. Bardwell prepared three reports (AE, pp. 377-455) and numerous calculations, including calculations based on what Quaker said it did. All calculations showed statistical probability of discrimination. The conclusions included:

1. Likelihood of age-neutral RIF: 3 in 100 billion

2. The ratings were tainted by age:

    a. All high potential ratings went to Younger Employees; none to Older Employees

    b. 90% of A ratings were awarded to Younger Employees

    c. 75% of C ratings (the lowest rating) were assigned to Older Employees

3. Likelihood that the RIF was age-neutral (excluding ratings): 4 in 10 billion

4. Likelihood that the RIF was age-neutral (controlling for rating, rating job category, and Hay points): 19 in 100,000

5. Likelihood that the RIF was age-neutral (peer analysis): 1 in 1 billion

All statistical analysis showed a high probability of discrimination.[15]

Instead, the trial court and majority became the trier of fact, weighing evidence and substituting their determination of facts for that of the trier of fact.[16] The court refused to consider evidence for Gentile that a jury could consider, including evidence from independent fact witnesses, while accepting the explanation of Quaker's highly-compensated trial witness, which a jury was free to disregard as true. Quaker presented no independent evidence. Summary judgment in this case violates *Reeves* and Chuang.

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[15]The Court's analysis goes to the weight of the statistics, not admissibility! *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

[16]*Accord: Oeppe v. United Airlines*, 217 F.3d 1262 (9th Cir. 2000) (reversing summary judgment in favor of a plaintiff appealing from a discrimination claim under the Americans with Disabilities Act *("ADA")); Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *en banc* (reversing summary judgment as there were genuine issues of fact, O'Scannlain dissenting).

IV. CONCLUSION

Rehearing and *en banc* review is required to maintain uniformity in Ninth Circuit precedent, as well as avoid creating precedent that contradicts the United States Supreme Court. Justice and the "rule of law" should **NOT** depend upon the luck (or bad luck) of the draw on which members of the Court are assigned to a particular panel. Upon review, it is requested that the trial court summary judgment be reversed and all ADEA claims and all state law claims be remanded for a jury trial.

DATED this 7th day of December 2000.

MOHR, HACKETT, PEDERSON,
BLAKLEY & RANDOL PH, P.C.

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APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed January 10, 2001]

PERRY E. COLEMAN; BARBARA J. COLEMAN, husband and wife, *Plaintiffs - Appellants*,	) No. 99-15885
v.	) D.C. No. CV-96-0828-PHX-RCB
THE QUAKER OATS COMPANY, a New Jersey corporation, *Defendant - Appellee*.	)

JERRY JENEY; PEGGY JENEY, husband and wife, *Plaintiffs - Appellants*,	) No. 99-15886
v.	) D.C. No. CV-96-0822-PHX-RCB
THE QUAKER OATS COMPANY, a New Jersey corporation, *Defendant - Appellee*.	)

PERRY E. COLEMAN; BARBARA J. COLEMAN; JOHN RUSSELL; JERRY JENEY; DENIS SCHWEITZER, a divorced man; JOHN TALLARITI; KENNETH NERO, GARY PEEPLES; J. THOMAS CHRISTENSON; SHARON RUSSELL; PEGGY JENEY; TERRINE TALLARITI; KATHLEEN FLAMM NERO; JAN MARIE IMMKER PEEPLES; KAYE CHRISTENSON; CAROL COLLINS, a single person, *Plaintiffs*, and JOSEPH GENTILE; LORRAINE GENTILE, husband and wife, *Plaintiffs - Appellants*, v. THE QUAKER OATS COMPANY, a New Jersey corporation, *Defendant - Appellee*.	) No. 99-15887)) D.C. No.) CV-95-1516-) PHX-RCB

ORDER

Before: B. FLETCHER, CANBY, O'SCANNLAIN, Circuit Judges

A majority of the panel has voted to deny plaintiffs-appellants' petitions for rehearing and suggestions for reheating en banc. voted to deny the petitions for rehearing. Judge Canby recommended against the suggestions for rehearing en banc. Judge O'Scannlain voted to deny the suggestions for rehearing en banc. Judge B. Fletcher voted to grant the petitions for rehearing and recommended in favor of the suggestions for reheating en banc.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc.

Fed. R. App. P. 35.

The petitions for rehearing and suggestions for rehearing en banc are therefore DENIED.